A TREATISE

ON THE

LAW OF MORTGAGE,

AS ADMINISTERED IN THE

COURTS OF THE EAST INDIA COMPANY,

IN THE

PRESIDENCY OF FORT WILLIAM.

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ADVERTISEMENT TO THE SECOND EDITION.

SINCE the first Edition of this Treatise was published, the repeal of the usury laws has effected a very material change in the rules by which mortgages are governed. A second Edition of the work being called for, I have taken the opportunity of introducing into it many alterations rendered necessary by that change. I have also added a large number of important decisions of the Courts, which have been delivered during the last two years, comprising all the later cases down to May of this year.

A. G. M.

Calcutta, Dec. 10*th*, 1856.

CONTENTS.

Introductory Chapter,... 1

Chapter II. Of the various kinds of Mortgages, ... 9

" III. Of Persons capable of Mortgaging, ... 16

" IV. Of Mortgage Contracts, ... 25

" V. Of the Necessity of Proving the Consideration, ... 56

" VI. Of the Registration of Deeds, ... 67

" VII. Of Stamps and the Valuation of Suits connected with Mortgages, ... 73

" VIII. Of the Relative Estates and Duties of the Mortgagor and Mortgagee, ... 94

" IX. Of Redemption,... 118

" X. Of the Remedies of the Mortgagee, including Foreclosure, ... 160

" XI. Of Accounting,... 221

" XII. Of Mofussil Mortgages in relation to the Law and Procedure of the Supreme Court, ... 238

ABBREVIATIONS.

Sel. Rep. Reports of Select Cases decided in the Calcutta Sudder Dewanny Adawlut from 1791 to 1848.

S. D. A. Decisions of the Calcutta Sudder Dewanny Adawlut recorded in conformity with Act XII. 1843.

N. W. P. Decisions of the Sudder Dewanny Adawlut North-Western Provinces, recorded in English in conformity to Act XII. 1843.

Rep. Sum. Cases. Reports of Summary Cases.

INTRODUCTORY CHAPTER.

A MORTGAGE may be defined as a pledge, for securing a debt, of lands of which the debtor and those claiming under him remain either the actual owners, or in a position to assert their rights as actual owners, until debarred by judicial sentence or by legislative enactment. Mortgages of land have long been in use all over India, and are well known in Hindu and Mahomedan law.

The Mahomedan law made no distinction between mortgage of land and pledge of other property(*a*). Possession or seisin of the thing pledged, was in all cases the essence of the security, and hypothecation, the giving a lien over a thing without actual possession of it, seems to have been originally unknown. But all that was required in order to give validity to the contract, was that possession should be once given so as to evidence the fact of the mortgage having been made. And a mortgage did not come to an end on the mortgagee's going out of possession, if he did not do so with the intention of relinquishing his security(*b*): nor was the right of a mortgagee

(*a*) Macnaghten's Mahomedan Law, p. 74.
(*b*) *Ibid*, p. 354.

who had obtained possession, injured by his being subsequently ousted by the mortgagor. Although possession was necessary in order to complete the mortgagee's title, it seems that he was not entitled to the use, or to the actual enjoyment of the profits of the property pledged, except by special agreement(*a*). A mortgagee or pledgee in possession, had priority over other creditors with respect to the property pledged, and was entitled to satisfy his debt thereout, before it could be applied to the liquidation of other claims: the surplus only which remained after discharging the mortgage debt being divisible amongst other creditors(*b*).

The taking of interest was forbidden among Mahomedans, but the property pledged was always presumed to be in value equivalent to the debt due; and the mortgagee might in fact thus obtain, so long as he kept it in his own hands, what was of greater value than the sum lent(*c*).

The mortgagee could not, except by the consent of the mortgagor, at any time sell the property in pledge; at least, if he sold it for more than the principal due upon the loan, he had to account to the mortgagor for what he received in excess of that sum(*d*).

The mortgagor could not dispose of the property mortgaged without the consent of the mortgagee. Such a sale was legally valid, but its operation depended entirely on the pleasure of

(*a*) Macnaghten's Mahomedan Law, p. 74.
(*b*) *Ibid*, pp. 75, 347.
(*c*) Macnaghten's Mahomedan Law, p. 74.
(*d*) *Ibid*.

the mortgagee, unless the purchaser paid off the mortgage debt, which he was entitled to do, or the mortgage was from some other source redeemed(*a*). But the consent of the mortgagee confirmed any such disposition, so that if the mortgagor sold to two persons in succession, and the mortgagee recognised the second sale only, that sale took priority over the first(*b*).

No partial payment of the mortgage debt affected the mortgagee's right over the whole property pledged, and the mortgage remained in force, not only until redemption, but until the mortgagee in consequence of the redemption actually gave possession of the property to the mortgagor(*c*).

The Hindu law likewise, recognised no distinction between mortgages of land and pledges of other property(*d*), and the pledge might be for a limited or for an unlimited time, and either usufructuary or for custody only. Actual possession was probably originally(*e*) essential to their validity, although there is little doubt that hypothecation has existed in the country from a remote period(*f*). When no date was specified for redemption, a mortgage might be redeemed at any distance of time, no title by prescription being acquired by the mortgagee in possession(*g*).

(*a*) Macnaghten's Mahomedan Law, p. 176.

(*b*) *Ibid*, p. 355.

(*c*) *Ibid*, p. 356.

(*d*) Colebrooke's Digest, v. 1, chap. 3, Tit. "Pledge," p. 140.

(*e*) Colebrooke's Digest, v. 1, chap. 3, Tit. "Pledge," pp. 140—202.

(*f*) Strange's Hindu Law, v. 1, p. 288.

(*g*) Colebrooke's Digest, v. 1, p. 183. Strange's Hindu Law, v. 1, p. 290.

A mortgagee in possession had priority over all other mortgagees, if he obtained possession without force or fraud(*a*). The offence of one who, having mortgaged his property, afterwards fraudulently made a mortgage of it to another, was looked upon as a crime worthy of "whipping," "punishment for theft," "punishment as a robber," and even death(*b*).

Although such generally were the principles which regulated mortgages amongst Hindus and Mahomedans, many changes and modifications appear to have been from time to time introduced; and there is much inconsistency in the various doctrines laid down in the books. In Hindu law there are numerous written texts in which possession is declared to be absolutely necessary, in order to give validity to a contract of mortgage; as for example,—"By the acceptance or actual possession of a pledge, the validity of the contract is maintained"(*c*). "Pledges are declared to be of two sorts, immoveable and moveable, and both are valid when there is actual enjoyment, and not otherwise"(*d*). On the other hand there are texts, although they are fewer in number and perhaps of less authority, some of them partially, others of them absolutely in opposition to these:—"Of him who does not enjoy a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased"(*e*). "But if there be no occupancy, but a writing exist duly attested and so forth, the writing

(*a*) Colebrooke's Digest, v. 1, p. 211.
(*b*) *Ibid*, pp. 209, 210: Gentoo, Sec. 2.
(*c*) *Ibid*, p. 161. Yajnyawalcya.
(*d*) *Ibid*, p. 205. Vayasa.
(*e*) *Ibid*, p. 205. Vrihaspati.

shall prevail, because it is the best evidence of a transaction: it shall establish the mortgage"(*a*). It is evident that the original doctrine had been considerably modified, and that whatever may have been the case at first, a valid mortgage unaccompanied by possession, was a thing in later times not unknown in the Hindu law.

A strong argument in favor of the conclusion that possession is not demanded by either the Hindu or the Mahomedan law, as we found them existing in this country, may be drawn from the fact that all the legislation of the English Government on the subject, has proceeded on the basis that mortgages are alike valid whether accompanied by possession or not. The earlier legislation of the East India Company, did not profess to introduce new principles of law into the country, but rather to express and provide a better mode of enforcing those which already prevailed. The Regulations then enacted may therefore, so far as regards general principles, be presumed to be an embodiment of the law which was then found prevailing: and as they in no degree recognise any necessity for the mortgagee's being put in possession, it may reasonably be inferred that according to the law of the land no such necessity existed, either among Hindus or Mahomedans.

One learned writer on Hindu law, adopting apparently a suggestion made by Sir William Jones, goes even so far (*b*) as to think, that notwithstanding all that is said about the necessity

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(*a*) Colbrooke's Digest, v. 1, p. 215, Helayudha.

(*b*) Sir T. Strange, v. 1, p. 288.

of the delivery of possession in order to give validity to a mortgage, it is not unlikely that the mode of pledging without giving possession,—*i. e.* hypothecation,—originated among the Hindus.

The question as to the necessity for the delivery of possession (which the Regulations have put beyond doubt in the Courts of the East India Company) has been on several occasions raised and discussed in the Supreme Court under the statute (*a*), which enacts that in hearing and determining actions or suits between Mahomedans or between Hindus, all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Hindus by the laws and usages of Hindus: and when only one of the parties shall be a Hindu or Mahomedan, by the laws and usages of the defendant. At one time it was held that a mortgage between Hindus was invalid, where there had been no possession(*b*). But these cases are now overruled, and the Court has for some years back recognised the validity of, and given full effect to Hindu mortgages, whether accompanied by possession or not(*c*).

The forms in which mortgage securities were given, seem to have been the same as those now in use. The earlier Regulations shew that the usufructuary mortgage, and that by conditional sale, were of common occurrence prior to their enactment.

(*a*) 21 Geo. 3, Chap. 70, Sec. 21.

(*b*) Sibnarain Ghose *v.* Russickchunder Neoghy, Morton's Rep., p. 105.

(*c*) Colly Dass Gungopadhya *v.* Sibchunder Mullick, Morton's, Rep., p. 111
Sibchunder Ghose *v.* Russick Neoghy, Fulton's Rep., p. 36.

The law which now governs mortgages in the Courts of the East India Company, is that which is to be found in the Regulations, and in the orders and reported decisions of the Courts, and bare questions of Hindu or Mahomedan law rarely if ever arise(*a*). The law on the subject all bears date since the year 1780, when the legislature seems first to have interfered in the matter indirectly by an Act then passed, limiting the amount of interest which the lender of money might legally receive. One form of mortgage, which before that time was much in vogue, and which since the usury laws have been repealed(*b*), is likely again to come into common use, was of a very simple nature. The lender received from the borrower a piece of land, receiving the profits in lieu of interest, and retaining possession until the loan was paid off by the mortgagor; the risk of loss in bad years was set off against the profits, perhaps large, of good years; no question arose as to the precise sum received by the mortgagee, who was not bound to render any account: and the mortgagor was personally liable for the payment of the principal, but not for any thing further. The Regulation above referred to, however, and subsequent enactments(*c*), changed the character of such securities, and introduced a close system of accounting, which is applicable to all mortgages made before Act XXVIII. of

(*a*) S. D. A., 1848, p. 530; N. W. P., v. 7, p. 88.

(*b*) Act XXVIII. of 1855.

(*c*) Reg. XV. 1793, Section 10: Reg. XVII. 1806, Section 5: Reg. XXXIV. 1803, Section 9.

1855, came into force. They declared that no more than 12 per cent. per annum should be allowed as interest on any mortgage; that all sums received by the mortgagee in excess of 12 per cent., should go to the account of principal; and that whenever he had received a sum amounting to the principal with legal interest, the mortgage should be considered as cancelled and redeemed. In legislating on the subject of mortgages, the Government has for the most part been guided by a desire to protect the debtor against his creditor, and, acting on this principle, does not sanction in any case the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer,—unless such transfer be by the direct and immediate act of the proprietor himself(*a*).

(*a*) S. D. A. 1847 p. 354; N. W. P., v. 8, p. 447.

CHAPTER II.

OF THE VARIOUS KINDS OF MORTGAGES.

THERE are various kinds of mortgages now in common use throughout the districts subject to the jurisdiction of the Sudder Courts of Calcutta and of Agra, each kind being attended with rights and liabilities peculiar to itself. In one, the regular payment of the interest of the money advanced is well secured to the mortgagee, while the principal is not recoverable at any fixed period, or in one sum, but is only gradually to be liquidated from what is received from the land by the mortgagee, in excess of the interest he is entitled to, the mortgagor not being personally liable for the re-payment of either principal or interest. In another, the lien which the mortgagee has over the property, gives him no security for the regular payment of interest, but the mortgagor is personally liable for that and for the principal, which are, after a certain time, recoverable in one sum, either from the mortgagor or from the mortgaged property, the latter being liable to be sold, and the proceeds of such sale being applicable in the first instance towards the liquidation of the mortgage debt. In a third, there is no security for the regular payment of interest, nor is the

mortgagor personally liable for that, or for the principal, but, on default being made, the whole property passes away from the mortgagor, and vests absolutely in the mortgagee.

Whatever may be the form adopted, the mortgage is subject to the incidents attached by law to that form: and this apparently, notwithstanding any stipulations to the contrary, which the parties may have made between themselves(*a*).

There are five different kinds of mortgages. Three of these are simple and pure forms, wholly distinct from each other in their nature and properties(*b*). The others are merely combinations of the simple forms, and are governed by the rules laid down as to these forms, according as the particular matter in question belongs rather to one form than to another.

The three pure forms are (*c*):—

I. The usufructuary mortgage. II. The simple mortgage. III. The mortgage by conditional sale, kut-kubala, or bye-bil-wufa.

I. *The usufructuary mortgage.*—Where a man borrows money and gives up his land to the lender, who (unless his debt is paid off by the mortgagor) may retain possession until he has, from the issues and profits of the land, repaid himself the interest, or, according as the terms of the agreement in each case may be, the principal and interest, of the sum advanced by

(*a*) See N. W. P. vol. 8, p. 161.
(*b*) S. D. A. 1847, p. 354. See N. W. P. vol. 8, p. 117.
(*c*) S. D. A. 1847, p. 354.

him. Where the whole debt is to be satisfied out of the rents and profits, the mortgage corresponds with the original *vivum vadium* of the English common law : where the interest alone is to be liquidated from them, the case resembles that of a Welch mortgage(*a*).

Of usufructuary mortgages there are two kinds,—mortgages of the whole right and estate of the mortgagor, and mortgages for a term of years only.

Zur-i-peshgee leases,—leases granted on a sum of money being advanced,—have been decided to be on the same footing as pure usufructuary mortgages, and are dealt with as such(*b*); but this is only when there is a power of redemption within a certain period, reserved to the lessor either expressly or impliedly(*c*).

When a mortgage is given by way of lease, the loan is generally made re-payable on the same day that the lease expires, and the deed usually contains a stipulation, that if default is made, the lender and lessee shall continue in possession on the terms of the lease, until the debt is repaid from the profits of the land or otherwise.

If by the terms of the contract the mortgagee is to look to the usufruct of the land, for the payment of both principal and interest, the mortgagor is not personally liable for the payment

(*a*) Coote on Mortgages, p. 4.

(*b*) Sel. Rep., v. 4, p. 251; S. D. A. 1847, p. 167, 1852, pp. 280, 304: N. W. P., v. 8, p. 107, v. 10. p. 355, and the cases referred to there.

(*c*) S. D. A. 1855, p. 481: N. W. P. v. 8, p. 356, v. 10, p. 355.

of either, in the absence of a special agreement that he shall be so. And it would seem to have been held, that even where the application of the profits was expressly limited to the liquidation of interest, the mortgagor was not personally liable for the principal. There is little doubt, however, but that in this last case the mortgagor is liable for the principal, especially in a contract made subsequent to the passing of Act XXVIII. of 1855(*a*).

The mortgagor has the right of redemption at any time on liquidation of the debt, either from the usufruct, or by a cash payment or deposit in Court(*b*).

The mortgagee never can become absolute owner of the mortgaged estate of which he has possession, and the right of redemption remains to the mortgagor and his representatives after any lapse of time, however great.

II. *The simple mortgage.*—Where the borrower binding himself personally for the re-payment of a loan with interest, pledges his land as a collateral security for such re-payment.

He does not give up possession of the property to the mortgagee or permit him to enjoy the usufruct of it, nor does he covenant to make an absolute transfer of it in the event of non-payment. On default, the mortgaged estate does not at once pass into the hands of the mortgagee, nor does it of

(*a*) N. W. P. v. 3, p. 211: Sel. Rep, v. 1, p 121.
(*b*) S. D. A., 1847, p. 354.

necessity do so at all. The mortgagee enforces his security by suing the mortgagor for what is due on the loan, for principal and interest: having obtained a decree, he proceeds in execution to sell the land, and out of the proceeds of the sale to satisfy his own claim, the mortgagor being entitled to any surplus which may remain. The mortgagee may himself be the purchaser if he chooses(*a*). From the date on which the money advanced is in the agreement declared to be re-payable, up to the time of decree and sale, the mortgagor has the right of redeeming, on payment of the balance due in respect of principal and interest: that right however necessarily becomes extinct on a sale taking place.

The mortgagor in the case of simple mortgages, is liable to lose his land, but it does not thereupon vest in the mortgagee.

III. *The mortgage by conditional sale, kut-kubala, or bye-bil-wufa,*—is that in which the borrower, not making himself personally liable for re-payment of the loan(*b*), covenants that on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee.

If the debt is not paid as stipulated, the mortgagee can have the property transferred absolutely to him. For this purpose he must proceed to foreclose, according to certain prescribed rules, converting the conditional sale into an absolute

(*a*) N. W. P., v. 6, p. 218.

(*b*) *See* Cons. 898. Sel. Rep., v. 7, p. 92, and *post* chap. X.

one, and obtaining possession. Until he takes such proceedings, the mortgagor remains in possession and enjoyment of the property, and has the right of redemption on paying off what is due on the mortgage; but on foreclosure, that right ceases, and the property passes wholly from the mortgagor and vests in the mortgagee.

In mortgages by conditional sale, the mortgagor is liable to lose his estate, and when he does so, it passes at once to the mortgagee.

Combinations of these three pure forms give rise to two other kinds of mortgage, the one being the simple mortgage usufructuary, and the other the conditional mortgage usufructuary.

IV. *The simple mortgage, usufructuary*—is that in which, though the property is only collaterally pledged, as in the case of a pure simple mortgage, the mortgagee is permitted to have the usufruct of it. This may be done either by simply allowing him to receive the rents and profits, or by giving him a lease for a limited period. In either case, the proceeds are credited to the mortgagor against interest, and, if they exceed what the mortgagee is entitled to for interest, against principal also. As in a pure simple mortgage, the mortgagor is personally liable, and his estate subject to be sold on default, though redeemable until it is so sold.

V. *The bye-bil-wufa or kut-kubala, usufructuary.*—Where the mortgagee by conditional sale has the usufruct of the property, either by being merely put in possession and allowed to receive the rents and profits, or by having a lease

given to him by the mortgagor. The position of the parties up to the date on which the loan is re-payable, is in all respects the same as in a pure usufructuary mortgage. From that date their position resembles what it would be in a pure conditional mortgage. But the mortgagee is in the receipt of the profits of the land. Until he has obtainad a decree for foreclosure, he must account for such receipts unless his mortgage was made after the passing of Act XXVIII. of 1855, and the agreement is that the usufruct should be taken in lieu of interest. The mortgage is redeemed or cancelled whenever (prior to his obtaining a decree for foreclosure) the mortgagee has received a sum equal to the principal with interest at a rate not higher than 12 per cent. per annum, or if the contract was entered into subsequent to the passing of Act XXVIII. of 1855, whenever he has received the principal with the interest at the stipulated rate, or at such rate as the Court shall think proper if there be no stipulation on the subject.

CHAPTER III.

OF PERSONS CAPABLE OF MORTGAGING.

THE right to mortgage is *primâ facie* incident to the right of property, and co-extensive with it; but to this rule there are exceptions in the cases of lunatics and minors. Persons whose rights are of a limited or qualified nature, cannot do any valid act in excess of these rights. Thus a Hindu widow, holding property belonging to her husband's estate, which devolved to her in succession upon his death, cannot, except under certain circumstances, make a mortgage which will be valid against the heirs in reversion of the husband. And if the estate is ancestral property belonging to a Hindu family where the doctrines of the Mithila school prevail, and has been mortgaged without the consent of all those interested in it, or if the land is mal-i-wuqf or dewuttur,—land set apart and devoted to religious purposes,—a mortgage of it may generally be set aside.

Minors are incapable of executing a mortgage of their property. But a mortgage by a minor's legal guardian is valid, and will be sustained, if made *bonâ fide*, and for the benefit of the Minor or of his property(a).

(a) Sel. Rep. v. 4. p. 330; v. 5. p. 82; S. D. A. 1846, p. 371; N. W. P. v. 6, p. 234. *See* S. D. A. 1856, p. 392.

When a suit is brought to have such a transaction declared null and void, it would seem, that the courts will presume it to have been *bonâ fide* and proper, until the minor disputing it shews it not to be so. On the other hand, where the suit is brought by the mortgagee for the enforcement of a contract made with a guardian, it will lie on the plaintiff to shew, that the money advanced was borrowed on account of the minor, and moreover, that it was appropriated to his use(*a*).

Where money is borrowed on account of minors, this fact ought to be stated in any deed in which the transaction may be embodied ; and a guardian who mortgages his ward's property, ought to do so in his character of guardian, and not as if he were himself proprietor(*b*). A Ranee, the guardian of her minor son, mortgaged ancestral lands which had descended to him with the Raj. In the mortgage deed she was described not as guardian, but as if she were herself absolute proprietor, and the deed was set aside(*c*). So a sale of land made by certain persons, not as guardians on behalf of a minor (which was their real character), but as joint proprietors, was declared invalid. The Court said that all the parties who appeared as sellers were wrongly described, and that a deed vitiated by so serious a flaw, could not be regarded as conveying a good and sufficient title(*d*).

(*a*) S. D. A. 1848, p. 791.

(*b*) S. D. A. 1848, p. 791 ; N. W. P. v. 7, p. 21 ; v. 8, p. 156.

(*c*) N. W. P., v. 7, p. 21.

(*d*) N. W. P., v. 8, p. 156.

A mortgage made by a guardian is in all cases valid, if ratified by the infant after attaining his full age(*a*).

Without such ratification, money advanced to a guardian for what the Court does not consider to be for the minor's benefit, as, for example, money advanced to carry on excessive litigation, will be considered as having been obtained by the guardian on his own personal responsibility(*b*).

According to the doctrines of the Mithila school, the alienation of joint undivided property is invalid, without the assent of all the sharers, and is not valid even for the seller's own share, without such assent. Therefore when a mortgage of such property was made by the three sharers, but one of them was a minor and his assent could not be legally given, the mortgagee's claim against the two major proprietors, as well as against the minor, was in the absence of such assent, held to be invalid, and he could not succeed in a foreclosure suit: the mortgage was bad even as to the shares of the two partners, who were of age(*c*). A father of a joint Hindu family cannot alienate ancestral property during the minority of his sons, or, if they are of full age, without their consent(*d*).

Nor can the head of a Hindu family alienate such property during the minority of any brother, or without the

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(*a*) S. D. A. 1853, pp. 494, 525. (*b*) S. D. A. 1853, p. 531.
(*c*) S. D. A. 1853, p. 314. *See* S. D. A. 1847, p. 557; Sel. Rep. v. 4, p. 158.
(*d*) Sel. Rep. v. 6, p. 71. *See* S. D. A. 1853, p. 344.

consent of those brothers who are of age(*a*). To these rules there is an exception, where the alienation is made from necessity or for the manifest benefit of all interested(*b*).

Under the head of alienations from necessity are ranked generally, those made for the support of the family, for the services of religion(*c*), or for any 'pressing need.' Where decrees obtained by creditors were in execution against the father of a family, and the ancestral property had been advertised for sale in satisfaction of these decrees, and the father had been fined and was in jail under a criminal prosecution: it was considered that the necessity of the case justified an alienation of part of the property, in order to raise money to pay the fine imposed on the father, and to save the remainder of the estate from sale(*d*). And the necessities which may arise for such transfer, need not be connected with the ancestral debt(*e*).

But those who dispute a conveyance of this kind, can do so, only by bringing a suit to have it declared illegal and void, on the ground of the property being ancestral: and a suit brought by sons for possession as proprietors, on account of illegal alienation by their father, will not be entertained;—a son's proprietary right in ancestral property, not arising until after the death of his father(*f*), unless the father shall have expressly relinquished his rights(*g*).

(*a*) Fulton's Rep. p. 368. *Note a.*
(*b*) Fulton's Rep. p. 380.
(*c*) *See* Sel. Rep. v. 5, p. 24.
(*d*) N. W. P. v. 5, p. 327.
(*e*) N. W. P. v. 6. p. 414.
(*f*) N. W. P. v. 7, pp. 311, 365, v. 6, p 414; S. D. A. 1851, p 352, 1850, p. 282.
(*g*) Sel. Rep. v. 6, p. 65.

A childless Hindu widow in Bengal cannot make a valid mortgage or sale, of landed property belonging to her husband's estate devolved to her in succession after his death, nor even of her own life interest in such property, except where the sale or mortgage becomes necessary for her own maintenance, or for any indispensable duty, connected with her husband, such as acts designed for his spiritual benefit, or the payment of his debts. And a mortgage by a Hindu widow will be held invalid, if it is not proved by the mortgagee that the mortgage debt was incurred for the purposes of her necessary maintenance, or for some indispensable duty(*a*).

There has been much discussion on this question, and the widow's estate has been sometimes treated as an absolute life interest in the husband's property, alienable at pleasure for the term of her life; but the rule as stated above, seems to be that recognised by the Calcutta Court, in its latest decision on the point.

In the Supreme Court, however, it is held that there is no presumption against alienations by a Hindu widow, and such alienations will be supported, unless proved to have been improper. In giving judgment in the case of Goluckmonee Dabee *v.* Degumber Dey(*b*), the Court said:—" No part of the entire interest when the widow takes by inheritance, is in suspense or abeyance in any way, nor is there a reversion on a life estate,

(*a*) S. D. A. 1849, pp. 64, 405, and the authorities there quoted.

(*b*) Supreme Court, November 15, 1852; reported in the *Englishman*, Nov. 17, 1852.

but the whole interest is in the widow. When she takes as heir under the Hindu law, she is ranked in all treatises as heir. Sir Francis Macnaghten treats her estate rightly as anomalous, and other writers treat it as coming to her as heir; therefore when they term it also a life estate, they mean that expression in a sense different from that of a pure and mere life estate. Such an estate as that last described, may exist as well under the Hindu, as under the English law. It exists when by donation, whether testamentary or *inter vivos*, property is given to one for life. In such a case, there would be no distinction in the nature of the interest, from that of a similar interest created by donation under the English Law. The law upon the point has been settled by the decision of the Privy Council, (the decisions of which bind both the Courts of the Crown, and of the East India Company) in the case of Kosynath Bysakh *v.* Wumoosoonderee Dossee(*a*). On the first hearing of that case in this Court, the Court declared by its decree as to the estate of the widow, that she took an interest for her life, in the immoveable estate, and an absolute interest in the moveable; on the latter point adopting a distinction between moveable and immoveable estate, which does not prevail in Bengal; and also failing to mark the limitation or the power of disposal as to moveables. The case was re-heard, and the Court by a subsequent decree, rectified its own decree, declaring as to both immoveable and moveable that 'she should be

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(*a*) Clarke's Reports, Ap. p. 91.

declared entitled to the real and personal estate of her husband, to be possessed, used and enjoyed by her as a widow of a Hindu husband dying without issue, in the manner prescribed by the Hindu law.' It therefore expressly corrected the declaration that she took an interest for life, and declared her entitled in unrestricted terms, limiting the restrictive terms to the possession, use and enjoyment of the property. This decision was affirmed on appeal; since that decision the decrees of this Court in which it is necessary to declare what interest the Hindu widow takes, have been in conformity to it. It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law, that adverse possession which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life as known to the English law. Here the lessor of the plaintiff showed that the widow had made an alienation of the estate. Was the Court to assume it an unauthorized alienation? On what principle? We can discover none; there is neither authority nor principle to be found which would warrant the Court in saying, that under all circumstances, and whatever the nature of the suit or the position of the parties, or the rule which regulates the particular action, the presumption must ever be *primâ facie* against the validity of the alienation by a Hindu widow of the estate to which she succeeds as heir. Still less should that presumption be made, where possession has gone along with it for a long time, and a dormant title is asserted against a purchaser for value, after

many years. We have looked carefully through the cases cited, and can find none that establishes any such position. In our opinion the law presumes neither against nor in favor of an alienation by a Hindu widow."

And in another case in which the question arose(*a*), the Court held that the estate could not be considered as one given by way of maintenance, but as an absolute life interest, so long as it was not used in a manifestly improper manner: and that therefore, a Hindu widow was entitled to save as much as she pleased of the income received by her from her husband's estate, and by her will or otherwise, to dispose of such savings away from her husband's heirs.

A suit to set aside an improper alienation, should be brought by those parties whose interests are directly affected (as the next heirs), not by those whose rights are merely future and inchoate(*b*).

A Mahomedan widow cannot legally alienate property devolving upon her as dower, without the consent of the other heirs of her husband, and a mortgage made by her without such consent may be set aside by them(*c*).

A mortgage of land devoted to religious purposes, whether by Hindus or Mahomedans, is invalid; as also is a mortgage of the produce of such lands(*d*).

(*a*) In the goods of Hurrendernarain Ghose. Koylasnath Ghose, *v* Bissonath Biswas, Sup. Court, 30th June 1853.

(*b*) S. D. A. 1853, p. 641: N. W. P. v. 9, p. 411.

(*c*) N. W. P. v. 8, p. 45.

(*d*) N. W. P. v. 7, p. 118, Sel. Rep. v. 7, p. 268; *See* S. D. A. 1849, p. 65, 1855, p. 323.

And the fact that the alienation is only temporary, or that it has been made for the repairs or other benefit of a mosque or temple, or of the property itself, does not affect the case, according to the decisions of the Calcutta Court(*a*). But the Agra Court has held that it does not necessarily follow that because lands are wuqf, the temporary alienation of them by the mutuwallee is illegal:—and that the mutuwallee is in fact entitled to dispose of such portion of the property as may be required, in order to raise money for necessary repairs, the preservation of buildings in all cases of endowment being a matter of indispensable necessity(*b*).

Probably the principle which ought to rule all such cases is, that those alienations, and those alienations only, which fall within the scope and spirit of the endowment, are to be supported.

A mortgage by the mohunt of a Hindu temple, of land belonging to the temple, may be bad; but the faqueers attached to the temple, do not seem to be entitled to sue for the cancelling of the deed of mortgage, and erasure of the name of the mortgagee from the books of the collector. Their remedy is by proceedings taken by them before the Revenue Authorities, under Regulation IX. of 1810(*c*).

(*a*) Sel. Rep. v. 7, p. 268.

(*b*) N. W. P. v. 8, p. 433. *See* Macnaghten's Mahomedan Law, p. 328.

(*c*) N. W. P. v. 7, p. 118.

CHAPTER IV.

OF MORTGAGE CONTRACTS.

PARTIES may enter into a contract of mortgage in the same manner as they may make any other contract,—that is to say, their agreement may be either parol, or by deed. Proof of the existence of the contract is all that is necessary, and if satisfactorily established, a verbal agreement will have as full an effect as a written one; but if the contract be only a verbal one the Courts will require indisputable proof of it(*a*).

At the same time, verbal contracts are so open to misconstruction and fraud, and the difficulty of proving them after the lapse of time, is so great, that they are to be especially distrusted in the case of mortgages of land, where disputes seldom arise until some considerable period has passed: and mortgages by merely verbal agreements, are consequently seldom or never met with in practice.

As the possession of property without the means of showing the right to such possession, is of comparatively little value, and the mere holding of those means by another, gives him a certain power over the land and those to whom it

(*a*) Sel. Rep. v. 4, p. 168; *see* also v. 2, p. 74, and N. W. P. v. 4, p. 219.

belongs, a deposit of title deeds as security for a debt due, puts the creditor in a position to prevent the effective transfer of the estate without his debt being discharged. A deposit of this nature, in English law known as an "equitable mortgage," is treated as a valid simple mortgage of the whole property to which the deeds deposited refer, and is subject to the same rules as a regular mortgage(*a*). Such a security is evidently much more safe than a mere agreement unaccompanied by any deposit(*b*). But much risk and confusion are avoided, by having in all cases a short and accurate deed, attested by at least two credible witnesses, and duly registered, which may itself testify to, and aid in establishing, the real facts of the case and the intentions of the parties contracting.

A mortgage deed(*c*) should set forth shortly but distinctly, all the material points of the agreement which the parties really intend to enter into(*d*). It should state with strict accuracy, the consideration given, and the mode of giving it(*e*), the locality and description of the property pledged, the nature of the mortgage, the length of time it is to remain in force, and any other conditions which the parties may have agreed upon, together with the date of the execution of the deed.

(*a*) Sel. Rep. v. 6, p. 165 ; *See* also Reg. X. of 1829, Schedule A, Art. 35, where any contract accompanied with the deposit of title deeds, when the same may be made as a security for money due, or lent at the time, is declared liable to the same stamp duty as an ordinary mortgage deed.

(*b*) N. W. P. v. 7, p. 450.

(*c*) For precedents of mortgage deeds of different kinds, and also of a common English mortgage deed, *See* App. I., II. III. and IV.

(*d*) *See* N. W. P. v. 9, p. 455. (*e*) *See* Post. Chap. V.

The stipulations as to the payment of interest should be especially clear. In a case where the mortgagee had not the usufruct of the property, the mortgage deed was silent on the subject of interest. The Court on account of this silence refused to allow any interest from the date of the deed up to the time when the money lent became re-payable(*a*).

In one case, a mortgage deed was executed in the ordinary form. Two days afterwards the mortgagees executed an ikrar-nama in which they undertook to pay Rupees 110 to the mortgagor as subsistence money. The latter instrument did not mention, and was not mentioned in, the former. The mortgagees subsequently transferred their rights under the first deed to third parties. It was held that these assignees were not liable to pay the subsistence money. "There is nothing whatever to connect the subsequent engagement with the mortgage deed, nor can any privity of contract between the mortgagor and the parties to whom the mortgage was afterwards transferred by deed, be inferred from the evidence or circumstances of the case"(*b*).

If more deeds than one are requisite in order to carry out the views of the parties, but all of them forming part of the mortgage contract, each of them should contain a reference to the others, so that it may appear on the face of them that they all are but one transaction, and must be taken in connection with each other. Thus in making a mortgage by

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(*a*) S. D. A. 1855, p. 54: *See* also 1854, pp. 514, 518.

(*b*) N. W. P. v. 11, p. 6.

conditional sale, it is a common custom to make an absolute sale of the property, and at the same time to execute an ikrarnama declaring the sale to be only conditional, and made in fact by way of mortgage. A reference in each of these deeds to the existence and purport of the other, will be preventive of fraud and a protection to all parties(*a*).

The terms of a written deed may be varied or modified by a verbal agreement: but very strict proof of any such agreement is invariably required, and the *onus* of proving that the actual engagements between the parties differ from those written, lies on the party who alleges that such difference exists(*b*).

Although, however, it is very desirable that all the details of the agreement should be set forth distinctly, still the Courts will always deal with contracts, and construe deeds, according to what appears to have been the real intention of the contracting parties. It is therefore in no degree necessary that a mortgage transaction should be called such by name, or that the class to which it belongs should be expressly stated. An agreement that "until the amount of the bond shall be paid, the debtor will not transfer certain property, by sale, mortgage or gift," is held to be an hypothecation of the property mentioned,—a simple mortgage of it. So, a money bond containing a stipulation that until the money was re-paid, the debtor would not alienate his rights as zemindar, in any other quarter, was held to be a bond in the nature of a simple mortgage(*a*).

(*a*) N. W. P. v. 8, p. 564 : v. 10, p. 223 : Sel. Rep. v. 4, p. 174.
(*b*) N. W. P. v. 8, p. 473.

And so long as the nature of a transaction is materially such as to stamp it as belonging to a particular class of mortgages, the mere calling it by a different name will not transfer it to another class.

In one case, where there was an absolute sale, with a condition, that if the vendor re-paid the purchase money and interest by a fixed day, the purchaser should reconvey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held, that "redeemable sales," and "mortgages by conditional sale," were in their nature identical, and merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed, only in the same manner as a mortgage by conditional sale could be(*b*).

And on the same principle, zur-i-peshgee leases, are treated in all respects as simple usufructuary mortgages(*c*), when there is a proviso either express or manifestly implied, for redemption within a certain period.

When the mortgage is by way of lease, the deed ought to declare expressly, that the lease is in fact given as a mortgage security, and there should be a condition that if the advance is not re-paid when the lease expires, the mortgagee shall be entitled to hold on, until his claim is satisfied. In a case where

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(*a*) N. W. P. v. 8, p. 669 ; v. 7, p. 124.
(*b*) N. W. P. v. 8, p. 564 ; *See* Sel. Rep. v. 4, p. 174.
(*c*) *Supra*, Chap. II.

there was no such condition, but on the contrary there was a condition that if, at the expiration of the term for which the lease was granted, the lessor failed to pay down at one time the whole amount of the advance made, the lessee should be at liberty to take such steps as might be deemed proper, to recover the amount from the lessor, it was held, that the absence of a proviso that the lease should continue until re-payment, more especially when the deed contained a condition that the amount might be recovered from the mortgagor, formed a distinctive feature removing the case from the ordinary category of leases held to be usufructuary mortgages(*a*). In another case, the simple advance of 500 Rupees in consideration of receiving a lease for twelve years was held not to be a mortgage transaction, in the absence of any appearance of intention that it should be taken as such(*b*).

From badly drawn documents it is often difficult to discover what the exact nature of the transaction has been. This obscurity ought to be avoided, as the whole position of the parties depends upon the class to which the mortgage belongs (*c*): and when a deed is so loosely worded as to admit of more than one interpretation, the Courts will always construe it in the sense most favorable to the mortgagor(*d*).

In mortgages of an usufructuary nature, it should be stated clearly whether the profits are to be taken in lieu of interest

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(*a*) N. W. P. v. 8, p. 356.
(*b*) S. D. A. 1855, p. 481.
(*c*) N. W. P. v. 8, pp. 356, 370, 447.
(*d*) N. W. P. v. 5, p. 113.

only, or whether both principal and interest are to be recovered from them, because in the latter case the pledger is not personally liable (except under particular circumstances), and the mortgagee must look to the land alone for payment of his debt, and the interest thereon(*a*).

The parties may make any conditions or covenants, not in themselves illegal, that they please,(*b*) as, that the mortgagee in possession shall pay the mortgagor a certain allowance or rent :(*c*) that the loan shall be repaid by instalments, and that in default of payment of any one instalment, the mortgagee shall be entitled to foreclose for the balance then due:(*d*) that no payment made by the debtor shall be allowed, unless it is duly endorsed on the deed (although the Courts will notwithstanding such a condition, admit proof of payment of a sum not so endorsed) :(*e*) that after payment of Government revenue and village expences, the mortgagor shall pay to the mortgagee the entire surplus collections, and also all that may be derived from alluvion, and that if in the month of Jeyt in any year the whole surplus is not paid to the mortgagee, he shall be entitled to enter into possession :(*f*) that if any ground shall be lost from the encroachment of a river bordering on the estate, the mortgagor shall make good the loss, and if any thing is gained from the same river, the mortgagee shall make an allowance for it :(*g*) that a third party named, as well as

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(*a*) N. W. P. v. 3, p. 211: Sel. Rep. v. 1, p. 121.

(*b*) N.W. P. v. 7: p. 307.

(*c*) S. D. A. 1852, p. 577.

(*d*) N. W. P. v. 7, p. 322.

(*e*) S. D. A. 1853, p. 544.

(*f*) N. W. P. v. 8, p. 70.

(*g*) S. D. A. 1852, p. 928.

the mortgagor, shall have the right of redeeming :(a) that the mortgagor shall make good the balances of rent unpaid by cultivators :(b) that the mortgagor will not alienate or mortgage his interest until the debt is paid off with interest :(c) that the mortgagor, not retaining possession, shall pay the Government revenue,—and any other similar covenants.

The property intended to be mortgaged should be described, so that it may be readily recognised and identified. When there are villages or other places well defined, their names will suffice : in other cases the boundaries should be given.

It seems that future words, such as, "and whatever property I may hereafter acquire," or words which are general and do not refer to any specific property, will not give any lien to the mortgagee, as against an intermediate *bonâ fide* purchaser. Where there was a mortgage of certain villages named, and in the concluding part of the deed, authority was given to the mortgagee, on default of payment by the mortgagor, to sell the villages pledged, as well as "any other existing property and whatever may hereafter be acquired," a village acquired by the mortgagor after the execution of the deed, was held not to be included in the mortgage, so as to defeat the claim of a purchaser at public auction in execution of a decree of Court. The Court said that independently of the fact, that the mortgagor was not possessed of

(a) N. W. P. v. 3, p. 187.
(b) N. W. P. v. 7, p. 482 ; v. 8, p. 70.
(c) N. W. P. v. 6, p. 39 ; v. 7, p. 614 : *et passim*.

the village at the date of the deed, the words were to be treated as mere surplusage, because without them all his property was equally liable to make good the mortgagee's claim, should the pledged estate prove insufficient(*a*). In another case it was decided, that an agreement by a debtor to discharge a debt by instalments and "not to alienate any part of his property,"—the property not being specified,—until the debt had been paid," did not operate as a mortgage, or vitiate the title of a *bonâ fide* purchaser from the debtor. But it is doubtful whether, after the debtor has committed a breach of his agreement, "the creditor is any longer bound to act on the forbearance stipulated for by the *kistbundee,* and may not *at once* demand payment in full of the debt due to him"(*b*).

According to a decision of the Calcutta Court, all conditions are null and void, which are to the effect, that the mortgagee shall, on default being made by the mortgagor, have power to sell the mortgaged property, and so repay himself, without applying to the Court, or acting under its directions. A mortgage deed gave the mortgagee a power of sale over the estate, in case default should be made in payment of the mortgage money on a day named: the mortgagee sold under the power, and the purchaser brought a suit against the mortgagor to obtain possession of the land so sold to him. The Court refused to recognise the validity of such a power, or to give any assistance in carrying it into effect. The judgment of the Court,—which

(*a*) N. W. P. v. 7, p. 265. (*b*) S. D. A. 1855, p. 353.

was based on the principle often brought forward, but not very consistently carried out, that the mortgagor is as much as possible to be protected against the mortgagee,—was delivered in a long and elaborate dissertation on the subject of mortgages(a). "Such a condition might be perfectly consistent with the laws of a great commercial country affording every facility to the capitalist lender, but, at the same time, be quite inconsistent with the laws of a country deriving the great bulk of its revenue from the land, and as a recompense for the stringency of the rules under which it is compelled to collect its revenue in order to carry on the Government (sale of the estate being the penalty of default,) affording every possible protection, in his private transactions, to the land-holding borrower. The regulations will be searched in vain, for any express enactment prohibiting the sale of a mortgaged estate under a power of sale. But such a power is repugnant to the principles of the Regulations enacted by Government for regulating the transfer of immovable property in satisfaction of debt in general, and in satisfaction of debts on mortgage in particular. The regulations do not sanction, in any case, the transfer of immovable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself."

Such a power is therefore of no effect, as the law at present stands. But it may be doubted whether the dread of injustice

(a) S. D. A. 1847, p. 354.

to the mortgagor, which led the judges to the opinion which they formed, is sufficient to outweigh the manifest convenience and advantage to both parties, which arise from a sale unaccompanied by the expense and delay by which litigation is at all times attended. Moreover, except where there are strong reasons for it, interference with arrangements fairly made between individuals is much to be deprecated. There is nothing *primâ facie* inequitable in such a power, and if in fact any great oppression is worked by the mortgagee, or the land is sold for a manifestly unfair price, the mortgagor still has his remedy through the Courts.

In England also, it was once doubted whether such powers should be upheld and encouraged, and for a time the inclination and the decisions of the Courts were against them. But for a very long period, they have been uniformly supported and enforced. And now a power of sale on default is given to the mortgagee in almost every English mortgage deed. It is constantly acted upon, and no general complaint is heard of the evil effects produced thereby. On the contrary, such powers are found in practice to be very useful, and to be the means of saving much expense and delay: while in the event of any abuse of the privilege they confer, the mortgagor has no difficulty in obtaining relief from the Courts.

The observations of a well-known writer on the subject of English mortgages, seem very much to the point(a).

(a) Coote, p. 124.

"Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of Equity, but they were groundless : a slight consideration will shew that they are not within any of the mischiefs intended to be guarded against by the Courts of Equity, for they give nothing to the creditor beyond his principal interest and costs : they bestow on him no collateral or ulterior advantage ; and they only enable him with promptitude to obtain payment of his mortgage debt."

There does not appear to have been any decision of this question in the Agra Court : so that there such a power may perhaps be held to be valid.

With respect to the amount of interest for which the mortgagee may stipulate, and which he may recover, a very great change in the law has been effected by the recent abolition of the usury laws. Since the passing of Act XXVIII. of 1855, interest may be contracted for at any rate on which the parties choose to agree. But as to contracts made before the passing of that Act, it is otherwise.

No agreement to pay interest at a higher rate than 12 per cent. per annum can be enforced, if it was entered into prior to the passing of Act XXVIII. of 1855(a). By making such an

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(a) A question may be raised as to whether a contract made between the 19th September 1855 and the 1st January 1856, is subject to the Usury Laws or not? The doubt arises from the manner in which Act 28 of 1855 is drawn. Sec. 7 of that Act says, that the rights of parties shall not be affected in respect of contracts entered into *previous to the passing of this Act.* Sec. VIII. says, that the Act shall

agreement, the lender could not possibly gain any thing himself; but he might thereby greatly benefit his debtor. For no decree for the payment of interest even at 12 per cent. or less can be given on such a deed; while in certain cases, the whole transaction being null and void, the lender will be unable to obtain a decree for the repayment even of the principal monies advanced by him.

By Section 8, Regulation XV. of 1793(a), it is enacted, that "the Courts are not to decree any interest whatever, in any case where the bond or instrument given for the security and evidence of the debt, shall have been granted on or subsequent to the 28th of March 1780, and shall specify a higher rate of interest than is authorized by this Regulation to have been given and received subsequent to that date;" and by Section 9 of the same Regulation, "nor to decree any interest whatsoever in favor of the plaintiff, in any case when the cause of action shall have arisen on or subsequent to the 28th of March 1780, when a greater interest than is authorized by this Regulation shall have been received or stipulated to be received, if it be proved that any attempt has been made to elude the rules prescribed in it, by any deduction from the loan, or by any device or means whatever, nor to give any other judgment

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commence and take effect from the 1st of January 1856. The Act received the assent of the Governor General, *i. e. was passed*, on the 19th September 1855. According to Sec. 7, contracts made after that date fall under the new Act: according to Sec. 8, they do not do so if made before 1st January, 1856. There is little doubt, however, that subsequent to *the 1st of January* [illegible] the new Act is applicable to *all* contracts entered into after the 19th September 1855.

(a) Ben. R. 17, 1806, Secs. 2 and 3; C. C. P. R., 24, 1803, Secs. 7 and 8.

but for dismission of the suit, with costs to be paid by the plaintiff."

So that conditions by which it has been attempted to secure more than the principal sum advanced with interest at the rate of 12 per cent. per annum, are void not only as to the interest stipulated for in excess of that which the law allows, but as to the legal interest also: and on a deed with such a condition, a mortgagee can recover only the principal without any interest whatever. Should the attempt to secure interest at an illegal rate, have been made in such a manner as to be considered by the Court to be "elusive" of the law, a suit brought on the deed containing it, will be dismissed with costs, and neither the principal nor the interest can be recovered.

In a case of bye-bil-wufa, the mortgagee having exacted illegal interest by deduction from the principal, his suit to have the sale made absolute was dismissed with costs, as the transaction was a device contemplated by Section 9 of the law against usury(*a*). And so, if the deduction is made in the shape of "dharat," or discount(*b*).

There was a regular mortgage by conditional sale on an actual advance, and at the same time, the mortgagor transferred absolutely to the mortgagee certain other land, without any consideration, but under pretence of the transfer being in payment of charges for drawing conveyances, &c. This was held to be "elusive" of the usury law, and the suit of the mort-

(*a*) Sel. Rep. v. 5, p. 8.

(*b*) Sel. Rep. v. 5, p. 79.

gagee to render the conditional sale absolute, was dismissed with costs(*a*).

A deed in which sums which had not then been paid, were admitted as having been received, and an engagement entered into to pay interest on them from the date of the deed, that is, for a time before payment of them, was held to be usurious and "elusive," and a suit founded on it was dismissed with costs(*b*). From the report of another case it seems, that the deduction from the principal sum lent, of five per cent. under the name of gomashta's fees, and four annas per cent. as interest, would, if proved, have been held by the Court to bring the case under Section 9, Regulation XV. of 1793(*c*).

And a transaction is equally liable to be set aside whether it consists of one, or of several separate agreements, and even though the deed on which alone the suit is brought, is when taken by itself, perfectly free from any appearance of usury.

In a suit to obtain possession of certain premises, under a deed of byc-bil-wufa, where the mortgage had been foreclosed and the sale become absolute, it appearing that 12 per cent per annum was the rate of interest stipulated in the deed to be paid, and that the mortgagor had granted a separate bond in which he undertook to pay one per cent additional,—the transaction was held to be evasive of the law, and the suit was dismissed with costs. Here the mortgage deed, which was

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(*a*) Sel. Rep. v. 5, p. 346. (*b*) S. D. A. 1852, p. 516.
(*c*) S. D. A. 1853, p. 268.

in itself quite good, was the agreement on which alone the mortgagee's suit was founded: but it was vitiated by the existence of the other instrument(*a*).

A "theeka" lease of land was granted, ostensibly to the agent of a banker, who had just advanced a sum of money to the lessor; the banker at the same time got a mortgage of the same property, and an assignment of the theeka rent, which of itself more than covered the stipulated interest on the loan (8 per cent.) After paying the Government revenue, and deducting the interest at 8 per cent. there remained such surplus receipts as gave the mortgagee in the whole, interest at about 14 per cent. In the lease it was stipulated that no account of profits should be asked for by the lessor and mortgagor. The mortgagor sued to recover possession, alleging that the deeds were elusive of the usury laws, and that the principal, with the stipulated interest, at 8 per cent., had been liquidated from the usufruct. The Court held, that the two deeds were to be considered as one transaction, in the light of a simple usufructuary mortgage so contrived as to elude the usury laws. But, "as the mortgagor had not come into Court to ask that the principal should be declared forfeited in consequence of infraction. of the law of usury," he obtained his decree for possession, only on shewing that the principal sum with the stipulated interest, had been realised from the usufruct(*b*).

(*a*) Sel. Rep. v. 4, p. 106.
(*b*) S. D. A. 1852, p. 678.

A agreed to lend B rupees 8,000 for three years, at 18 per cent. interest. To provide for the payment of interest at this rate, without allowing it to appear that there had been any evasion of the usury laws, recourse was had to the following device. Two bonds, one for rupees 5,000, the other for rupees 3,000 were executed by B, who at the same time pledged a certain talooqua as security for the re-payment of the loan. B's two sons gave kubooleuts undertaking to pay rupees 960 annually for three years, as the rent of the pledged talooqua. This covered legal interest at 12 per cent; for the remaining 6 per cent., a third bond, for which no consideration passed, was given by B, for a sum equal to three years' interest on rupees 8,000 at 6 per cent. The Court "entertained no doubt that the device shewn to have been resorted to, to secure a higher rate of interest than is authorised by law, brought the case within the scope of Section 8 of the Regulation of 1803 (being the same as Section 9 of Regulation XV. of 1793), and the objection having been pleaded, that the lender was liable to the prescribed penalties, which the Court had no alternative but to enforce," the decision of the lower court was reversed, and the suit of the lender dismissed with costs(*a*).

A contract, the precise terms of which are not easily gathered was held to be "elusive," and the plaintiff's claim was dismissed with costs. The contract is thus described by the Court in giving judgment on an application

(*a*) N. W. P. v. 8, p. 411.

for a review. "The contract in the present case is complicated. A sum of money is lent, and it is to be re-paid at a fixed time, or a quantity of grain to the value of the loan is to be provided, not at the market rate of *that day* when it was dearest, and a comparatively small quantity would have sufficed, but at the market rate of the next month, when it would be at the lowest rate, the crop having been just reaped, and therefore a very large quantity only would have sufficed. A second condition was added, that failing to pay the loan, or to furnish the quantity of grain, at the cheapest rate, equal to it, a sum of money was to be paid which would purchase the quantity of grain valued at the dearest rate. In short a claim is thus made for rupees 3,975 upon a bond of a loan of rupees 2,000 after a lapse of only eight months"(*a*).

If the condition of re-sale (*i. e.* the condition on which a mortgage by conditional sale is declared to be redeemable) is such that, if carried into effect, the mortgagee would receive more than the principal and legal interest, this will be considered an evasion of the usury law.

Lands were sold on payment of rupees 4,401: by a separate deed, the vendee covenanted not to take possession until the lapse of a year and four months, at the end of which time the vendor might re-purchase on paying rupees 5,801, otherwise the sale to be absolute. The vendor did not re-purchase, and the lender sued for possession as on an absolute purchase.

(*a*) S. D. A. 1855, p. 452. *See.* p. 241; also S. D. Decisions, 12th November 1845.

But the transaction was held to be a bye-bil-wufa with a stipulation for the payment of illegal interest, and to be evasive of the regulations against usury. However, under the special circumstances of the case, the principal was not declared forfeited, but only the interest(*a*).

But forfeiture of principal as well as interest will be enforced, only where the contract is so covert as to be manifestly a device, implying disguise and trickery. There must be unexceptionable proof of a design to evade the law, before the penalty of dismissal with costs will be imposed(*b*).

Therefore, an open and avowed stipulation for [illegible] illegal interest, the interest in excess of 12 per cent. being called "mercantile excess," was considered as coming under the less penal clause, involving the loss of the interest only(*c*).

So, where the sum advanced being only rupees 600, the deed of mortgage shewed the annual produce of the land pledged to be rupees 142, of which the mortgagee was to be allowed rupees 127 as interest, paying the remaining rupees 15 to the mortgagor (which gave him about 20 per cent interest), this was held to be no attempt to evade the usury laws. One Judge however dissented, as the deed did not mention the word interest at all, but spoke of it as "profit," *intifa*,—a device which he was of opinion rendered the deed evasive, and the lender's suit liable to dismissal with costs(*d*).

(*a*) Sel. Rep. v. 2, p. 146.

(*b*) N. W. P. v. 10, p. 43.

(*c*) Sel. Rep. v. 5, p. 10.

(*d*) S. D. A. 1847, p. 459.

So, a bond in which it was stipulated that the borrower should pay the principal sum borrowed with interest at 18 per cent per annum, was held to fall under the less penal clause, the principal being recoverable, but without any interest. "There was here no attempt to elude the law by any device, inasmuch as the bond openly stipulated payment of interest in excess of that allowed"(a). In another case, the Court said: "the petitioner only claims the right to recover the principal of his debt, on the ground that the contract in excess of that allowed by law is *clearly stipulated* in the bond, and [illegible], the cause should have been decided under Section 8, Regulation XV. of 1793, and not under Section 9. The plea is a good one; we therefore, reverse the Lower Court's judgment. There was no attempt to *elude* the rules prescribed, by deduction from the loan by any device"(b).

And an open and avowed charge of 2 per cent. as commission for making up accounts, (in addition to the regular interest at 12 per cent), was held to be legal, *and not usurious*,—certainly not *elusive*(c).

In a case, where the bond contained a stipulation for only legal interest, but the defendant set up a case of usury, attempting to prove a verbal agreement by which he was to pay 12 per cent. additional, the Court declared;—firstly, that

(a) S. D. A. 1852, p. 1132; 1853, p. 893.
(b) S. D. A. 1855, p. 336.
(c) N. W. P. v. 10, p. 276, and cases there quoted.

this verbal agreement had not been proved, and secondly, that if it had, it would not have brought the bond within the terms of the usury law so as to cause the forfeiture of the bond. "Such a verbal agreement could not admit of being enforced, and if the illegal interest so stipulated were paid, it could only be at the option of the borrower. The inutility of such a stipulation, renders it extremely improbable"(a). These observations are very just, and admit of no dispute; but, inasmuch as they are applicable to every case of usurious contract that ever existed or that can be conceived, it does not appear in what respect they afforded any special reason for the decision in this particular case. If there was no contract, of course there was no infraction of the usury laws: if there was a contract, to pay and receive illegal interest, it was an usurious contract, and would have been none the more so, had it been embodied in a regular deed. In delivering the above judgment, it seems to have been forgotten, that it matters not how fully the parties may at the time of contracting have given their consent, or with what solemnities the contract may have been entered into,—in no case whatever, can the payment of illegal interest be enforced: and if illegal interest is ever paid, it is so "only at the option of the borrower."

It seems, that deeds which have been very openly acted upon, are not "elusive," although they would have been so, had they been kept more in the back ground.

(a) S. D. A. 1853, p. 259.

In one case, it was said that had the deed not been registered, Section 9, Regulation XV. of 1793, would have been applicable:—but as it had been registered, Section 8 was held to apply, and the interest only was declared forfeited(a).

This is not however a very satisfactory decision, or any sufficient authority for considering it established, that registration will take a transaction out of the scope of the more penal section, if it would otherwise fall under it. Registration in no case gives any great additional weight to a deed, and its principal object is merely to afford satisfactory proof of the fact of deeds having been actually executed prior to the date on which they are registered. The authenticity and validity, and consequently of course the legality, of a registered deed, must be established just in the same way as that of an unregistered one which has never left the hands of the parties(b): and the amount of publicity given to transactions by registration as at present carried out, is very small.

It will be seen from these decisions that, in general it is not easy to say, whether a case comes under the more, or under the less stringent section of the usury laws. We can only gather, that the greater the pains taken to conceal the existence of an agreement for usurious interest, the greater is the risk of loss to the lender.

(a) Sel. Rep. v. 2, p. 146.

(b) S. D. A. 1853, p. 245; N. W. P. v. 6, p. 266; Act XIX. of 1843.

What benefit can ever have arisen, from drawing a distinction between cases "elusive," and those not so, it is difficult to perceive: for to say that a man who openly stipulates for illegal interest shall run the risk of losing only that interest, while the man who makes the same agreement covertly shall risk not only the interest but the principal, seems, without affording any substantial protection to the borrower, merely to give encouragment to the more open infraction of the law.

Laws against usury, have every where and at all times been found exceedingly difficult to enforce, and more especially so in this country, where they have not in fact been steadily or rigidly carried out. The more penal section inflicts a very severe punishment on those who are dealt with according to its provisions, and the Courts have therefore always had a tendency, to bring as many cases as possible under the more lenient one.

A contract will not be bad, under either section of the act, unless there is an attempt to obtain, in the whole, more than the principal with legal interest.

Therefore, when the mortgagee, who was a Mahomedan and wished to avoid the appearance of taking interest, actually advanced only rupees 1,300, but consolidating the legal interest of that sum for five years (rupees 781), the period during which the mortgage was made redeemable, took a mortgage bond for the aggregate sum of rupees 2,081;—it was held, that he was entitled to recover the sum actually advanced, with interest at the rate of 12 per cent. per annum, as there was

no attempt or intention in fact to get more than legal interest(*a*).

It is a common practice in drawing up bonds, payable by instalments, to provide for the interest accruing during the currency of the bond, by adding a certain sum to the original debt, and taking a bond for the whole sum: and this may be done without any infraction of the usury laws, so long as the additional sum stipulated for as interest, does not exceed the limit prescribed by law(*b*).

In an agreement mortgaging land, the rents of which amounted to about rupees 2,500, it was stipulated that out of these rents, the mortgagee should pay himself interest at 10 per cent, with 10 per cent as expenses of collections, and should discharge certain public burdens, devoting the surplus to the reduction of the principal,—and that if the rents fell short of rupees 2,500 a year, the mortgagors should make them up to that sum. This was held to be a good agreement, and not usurious; and the rents falling short of rupees 2,500 a year, the mortgagee recovered the deficiency from the mortgagor(*c*).

In one case, where there was a condition in a mortgage deed (the mortgage being of an usufructuary nature), that the mortgagor should not demand a settlement of mesne profits when redeeming, the Court expressed an opinion that such a condition had a tendency to evade the laws against usury, but

(*a*) Sel. Rep. v. 2, p. 255; *See* S. D A., 1852, p. 577.
(*b*) N. W. P. v 9, p. 487. (*c*) S. D. A. 1848, p. 872.

held that such a stipulation was to be disregarded, and the general rule as to redemption, applicable to mortgages of the nature of the one in suit, acted upon(a).

So in like manner, a condition that the mortgagor shall have no right to claim an account of the proceeds of the estate during the occupancy of the mortgagee, cannot (and no similar special condition between the parties can) bar the operation of the law, by which the lender " is to account to the borrower for the proceeds during his possession." It appears to have been the opinion of one judge, that if the point were raised by the mortgagor, such a condition would most likely be held to render the whole bond void, as being illegal and evasive of the usury laws(b). And there can be no doubt that such conditions are in most instances usurious in their nature. But they are not so treated by the Courts, which—apparently because until the accounts are taken it cannot be ascertained with certainty whether more than the legal interest has been in fact received by the mortgagee,—make an exception in their favor, and simply look upon them as futile and void conditions introduced into an otherwise good contract. And in contracts made after Act XXVIII of 1855 came into force, such conditions are legal and will be enforçed.

The rules against usury do not, however, apply to cases in which the principal money is in any danger, the regulations being held to refer only to common cases, where there

(a) N. W. P. v. 7, p. 307.

(b) S. D. A. 1851, p. 632 ; N. W. P. v. 5, p. 456 ; *see* Sel. Rep. v. 1, p. 119.

is supposed to be fair security for the principal. Any extraordinary risk run by the lender, is considered a sufficient ground for extraordinary interest being allowed him.

In one very remarkable case (which is referred to merely because it contains a recognition of the principle just stated), a surety who had advanced money to pay the Government revenue was allowed to recover from his debtor more than 12 per cent. interest, as a compensation for the risk run by him. "He who stands security for another for the payment of large sums to Government, who never remit an iota of their dues, would need to have the prospect of some profit to himself"(*a*).

There was a zur-i-peshgee lease: the farm was given out and out, the period for its continuance being fixed, and there was to be no claim by either party for profit or loss. The case was in fact one of absolute purchase of a lease, and it is difficult to see how any question of usury could have been raised. It was raised, however, and it was held that there was nothing usurious in the contract, however large the profits realised might be. Whether the amount paid was realised or not, the farmer could not continue to hold the land, after the period fixed, so that there was a risk, and no usurious attempt. As the farmer could not claim in case of loss, so neither could he be called upon to refund any profits obtained by him(*b*).

(*a*) Sel. Rep. v. 3, p. 261.

(*b*) S. D. A. 1849, p. 134.

And the same principle is recognised in another case, reported as one of usury, though not in fact coming under that head at all. A bond for rupees 4,000 with interest at 12 per cent. was bought up for rupees 1,000, the seller covenanting for title. The purchaser sued the parties liable on the bond, and the Court held, that the transaction was not usurious, the purchaser having paid rupees 1,000, for the chance of getting rupees 4,000, but having risked the loss of the whole. (*a*). It seems here to have been forgotten, that in one case only can a contract be usurious, namely, where there is an agreement that the borrower shall pay, in the whole, more than the sum received by him with legal interest. If the contract is not usurious from the first, it never can become so. The price paid by the purchaser of the lender's rights, could not by any possibility affect the nature of the contract. The borrower so long as his own position was not interfered with, had nothing to do with any arrangements between the lender and a purchaser from him, and ought not to have been allowed to go into the matter at all.

When the suit in which the evasive nature of the transaction is shown, is one brought by the borrower, the provisions of the Section under which neither principal nor interest are recoverable will not be put in force, unless the plaintiff expressly pleads that his case comes under that section. Thus, if a mortgagor sues to redeem on the ground of his debt having been paid off with legal interest, he will fail in his suit,

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(*a*) S. D. A. 1852, p. 542.

if he does not make out his case, although the mortgage transaction turns out to be of a highly usurious and elusive kind(*a*).

But it does not seem, that the converse of this proposition can hold good, and that when a lender or mortgagee sues to enforce his claim, this section ought not to be applied, unless when expressly pleaded. It is true that an observation incidentally made by the Agra Court in deciding another point, seems to imply that such would be the case. The question however, was not before the Court: and the language of the Regulations appears imperatively to require the Court to dismiss with costs, any suit brought by the lender, to which the section applies, whether it is specially pleaded by the borrower or not(*b*).

A person pleading a plea of usury, will be bound by the terms of his plea, and will obtain no relief but that which he seeks: the Court will not carry his defence further than his own allegations do.

Thus, where the plea is that the transaction falls under Section 8, of Regulation XV. of 1793, and that therefore the defendant is not bound to pay interest, the Court will decree payment of the principal, although it expresses an opinion that Section 9 is applicable to the case, and that if it had been so pleaded, they would have declared the principal also to be forfeited(*c*).

(*a*) S. D. A. 1852, p. 678. (*b*) N. W. P. v. 8, p. 411.
(*c*) S. D. A. 1852, p. 678.

When the plea alleged a verbal agreement to pay double the legal interest, and the evidence went to prove a deduction made from the sum advanced,—the whole defence was rejected, as no defence, not in accordance with the plea, could be admitted(*a*).

It not unfrequently happens, that one who has lent money on mortgage, subsequently makes further advances to the mortgagor, it being agreed that the property mortgaged shall be charged with the re-payment of these further advances(*b*). "The practice of taking bonds of subsequent date to the original mortgage, which is thereby rendered liable for the discharge of the aggregate amount, is far from uncommon, and has been fully recognized by the Court"(*c*). In such cases, the land will be considered as mortgaged for the aggregate amount of the original and subsequent loans. It is, however, only when it is expressly agreed that the subsequent loan shall be a further charge upon the land, that it will be treated as such(*d*).

Loans by way of further charge are not to be dealt with as transactions perfectly separate from and independent of the original loan. The accounts on both the original and the subsequent loan are to be taken on the footing of the former, —and this, even although there are special stipulations as to the latter. Thus, when the original mortgage bond contained

(*a*) S. D. A. 1853, p. 259.
(*b*) N. W. P. v. 7, pp. 34, 248, 607 : v. 8, pp. 112, 692 and 726.
(*c*) N. W. P. v. 8, p. 726.
(*d*) N. W. P. v. 9, p. 465.

a proviso that the interest should be paid *before the principal*, and the second bond stipulated that the interest should be paid *when the mortgage was redeemed*, it was held that the accounts must be taken on the footing of the original mortgage(*a*).

When questions as to priority arise, the mortgage will, no doubt, as to each particular sum, be considered to bear date, only from the time when that sum was charged on the mortgaged lands, and will not, as to the subsequent advances, take the date of the original mortgage contract.

The only reported case, however, in which the question of priority seems to have been raised, rather leads to the conclusion,—so far as any conclusion may be drawn from a report so unsatisfactory,—that a mortgagee for the aggregate of sums advanced, would be allowed to have precedence, as to the whole of these sums, over mesne incumbrancers(*b*). And this is perhaps right, where, as apparently in the case just referred to, the original deed contains a condition against subsequent alienation of any kind, as any alienation made in the face of such a condition has been held to be absolutely void(*c*). But in ordinary cases of further charge on mortgages without any such special condition, the only just or equitable principle seems to be, that each separate sum shall rank from the date on which it becomes a charge on the lands. Where there is no want of good faith on the part of either of the

(*a*) N. W. P. v. 9, p. 465. (*b*) N. W. P. v. 7, p. 31.
(*c*) Post, Chap. VIII.

lenders, the equity of the one is equal to that of the other, and there is no reason why the Courts should incline more in favor of one than of the other. Nor does the fact of a mortgagee's having a good security for a part of his advance, give him any additional claim to have his security as to the remainder enforced, in preference to those who have equally *bonâ fide* lent their money on the property pledged.

The further charge ought to be made by a new deed applicable only to the sum to be charged: and when the original mortgage deed is thrown aside, and a fresh deed executed, by which the property is mortgaged for the consolidated sum, there is danger of the original mortgage, as well as the further charge, being held to rank only from the date of the later deed.

This observation, however, is not supported by the case last referred to. There, the mortgagee took a new mortgage bond for the aggregate amount of the sums advanced by him. The zillah judge held that the original deed was annulled by the later one, and that the claim of an intermediate incumbrancer took precedence. But the Court, on appeal, said that this was not so: the original deed "was *superseded*, it was true, by the later one; but up to the time of the later instrument's execution, the previous deed was in full force." And it was remarked that, "the question was, whether the owners of the property in dispute were competent to execute the bond which constituted the intermediate incumbrancer's cause of action"(*a*).

(*a*) N. W. P. v. 7, p. 84.

CHAPTER V.

OF THE NECESSITY OF PROVING THE CONSIDERATION.

In all cases where the agreement has not been entered into by a deed duly executed, the Courts, both of Calcutta and of Agra, are agreed in insisting on satisfactory proof being adduced, that the consideration which is alleged to have passed between the parties, actually did pass, and that it did so in the manner and at the time alleged.

Where, however, the contract has been embodied in a duly executed deed, great caution is necessary with regard to recitals or statements of the consideration. The decisions of the two Courts on this subject, are not unanimous or consistent. It will be useful to consider them in detail, especially as the consequences which may ensue from the introduction into deeds, of false or incorrect statements as to the consideration, do not seem to be generally known.

It is, on the whole, better that the consideration which has passed, should appear on the face of the deed. But if it does so, the real truth of the matter must be stated: and this is a

rule, which cannot be disregarded, without incurring the risk of vitiating the whole instrument.

Regulation III. of 1793, Section 15(*a*), prohibits the Courts from "decreeing the payment of any sum due on a tumussook or bond, unless the bond shall have been proved to have been executed in the presence of two credible witnesses, or the payment of the sum demanded on the bond, or some other valuable consideration for it having been received, shall be proved to the satisfaction of the Court."

It will be observed, that this regulation is in its terms prohibitory, rather than mandatory:—that it prohibits the Courts from enforcing payment of money due on a bond, unless the bond has been duly executed, or the consideration is proved to have been received, but does not positively enact, that when such due execution, *or* such payment of consideration, is established, the obligation in the bond shall be enforced. It seems that on the principle "*expressio unius est exclusio alterius*," the more natural interpretation of the Section is, that bonds are to be enforced if either the due execution or the consideration is proved, and that it is not necessary to prove both the execution and the consideration. The words in which the Section is expressed, however, are open to both constructions, and have caused some inconsistency in the decisions of the Courts.

The Calcutta Court recognises no distinction between cases where there is a deed duly executed, and those where there is

(*a*) Regulation VIII. of 1805, Section 6.

not; in all alike, it requires proof that the consideration has actually been paid, and that it has been paid, in the manner stated in the deed, if there is a deed, or in the manner alleged in the pleadings, if there is no deed.

A suit was brought on a mortgage bond, the due execution of which was admitted, but the payment of the consideration money denied. The zillah judge did not decide the question of payment, and the case was referred to him, to try this "the principal point at issue in the case." It was remarked by one of the judges of the Court of appeal, in giving his judgment, that "the mere execution and registration of a document setting forth the payment of money, are not in themselves conclusive evidence of legal payment. There must be other sufficient proof of payment"(*a*).

In a case(*b*), where the question was fully discussed and considered, the Court said:—"It has been argued that in cases of this kind, the real issue to be tried is, whether the signature of the party giving the bond, was affixed in acknowledgment of the consideration money, deliberately and willingly or not, and that on failure of the defendant to establish affirmatively that his signature was obtained under the influence of force or fraud, decree must pass for the plaintiff. We remark, that it has become the established practise of our Courts, in cases of contract, to require satisfactory proof that consideration has actually been received according to the terms of the contract. It has never been held in our Courts, that a con-

(*a*) S. D. A. 1850, p. 510. (*b*) S. D. A. 1853, p. 25.

tract made under seal of itself imports that there was a sufficient consideration for the agreement." And in another case,—" It is an established principle of our Courts, that in claims of this kind, where consideration is denied, the fact of actual and *bonâ fide* payment must be established, before a decree can pass for the plaintiff"(*a*).

A suit for foreclosure was dismissed with costs, because it appeared in evidence that the mortgagor had given, at the time of making the mortgage, an acknowledgment of payment in full of a loan of a certain sum, while the plaint of the mortgagee stated that the mortgage was given, not in consideration of a present advance, but as security for large arrears of interest then due on an old debt to the mortgagee. Proof of a consideration other than that alleged on behalf of the plaintiff, was declared by the Court to be inadmissible(*b*).

A mortgage deed containing an acknowledgment of payment in full to the mortgagor of a certain sum at the time of executing the deed, was declared null and void as a mortgage deed, because, when the mortgagee was called on to prove payment of the consideration, the evidence shewed that the money was not in fact paid until sometime after the date of the deed, and was then distributed by the mortgagee to certain third parties, at the special request of the mortgagor. The Court said, that the mortgagee's own evidence disproved the state-

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(*a*) S. D. A. 1853, p. 887 : and so, p. 310, and 1856, p. 378.

(*b*) S. D. A. 1851, p. 648.

ment in his deed, which contained no allusion to any thing but a direct payment to the mortgagor, and that it could not uphold a deed of such a nature. The mortgagee was however allowed to sue,—but not on the deed,—to recover the sum actually paid by him, under his engagement with the mortgagor(*a*).

The rule was certainly very strictly and harshly enforced in this last case, which is in direct opposition to the practice of the Agra Court on this point(*b*). The mortgagee proved that he had *bonâ fide* expended, for the benefit of the mortgagor, and in the manner pointed out by him, the whole of the money in consideration of which the mortgage was given. If there had been no proof that payment was actually made in some other shape than that alleged in the deed, there would have been some ground for the decree. But as there was in fact a valuable consideration for the bond, it ought to have been enforced.

On the other hand, the Agra Court recognises a distinction between those contracts which are evidenced by deeds duly executed, and those which are not, although it has not defined with any precision the length to which this distinction is to be carried. A strong inclination is, on the whole, perceptible in that Court, in favor of duly executed deeds, considerable weight being attached to them, and statements contained in them being generally not discredited, except on

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(*a*) S. D. A. 1848, p. 747. (*b*) Post, p. 64.

convincing evidence. The regulation(a) is construed as making proof of consideration unnecessary, as a general rule, where there is a duly executed deed.

The Judge of Mooradabad reported to the Agra Court, amongst other things, that a very common practice prevailed in the Courts, of requiring proof, not only of the execution of the bond, but also of the receipt of the consideration by the obligor,—which seemed to him to be more than the regulation demanded, or than was at all conducive to the ends of justice. The Court, in its reply dated the 5th September 1850, says(b):—"In your 7th para. you speak of an anomaly in the law, as laid down in Clause 3, Section 6, Regulation VIII. of 1805: but the terms of that enactment, and your own remarks upon them, shew, that the fault which you impugn, lies not in the law, but in the mistaken administration of it; and it is in your own power to correct any such error, if you have noticed it in the practice of the Courts subordinate to you, and thereby to put a stop to the mischief which you ascribe to its operation."

In one case, it was pleaded that a deed of sale was void, because the purchase money was never fully paid. But the Court held, that non-payment of a portion of the purchase money, does not necessarily make a sale incomplete,—the deed of sale having been duly executed. It was however

(a) Regulation VIII. of 1805, Section 6.

(b) No. 1,315, para. 3, 5th September 1850. Report of Select Committee of the House of Commons on Indian Territories, 1852, Ap. p. 608.

observed, that deeds may in some cases be avoided by objections relating to the consideration on which they are founded, or to the want of consideration, but that generally speaking, the delivery of the deed evidences the completeness of the transaction(*a*).

On the same occasion it was remarked, that in Stephen's Commentaries on the Laws of England(*b*), was to be found a principle stated, which was applicable to every state of society. "A writing sealed and delivered is supposed to be made with due deliberation, and to express fully and absolutely the intention of the party by whom it is executed : he is therefore bound by its execution whether he received a consideration for the grant or engagement which it comprises, or not." The author from whom the quotation is made continues:—"Whenever it appears that a deed was obtained by fraud, force, or other foul practice, or it is proved to be an absolute forgery, it is not only incapable of being enforced, but may be formally set aside by the judgment or decree of a Court of Judicature."

In another case(*c*) the Court said, it had never been ruled by them "that it is not matter for inquiry whether the full purchase money has been paid or not, or that a plaintiff must necessarily obtain possession of the thing sold, even on irresistible demonstration that complete payment has not been made provided only that the genuineness of the deed be established.

(*a*) N. W. P. v. 5, p. 364. (*b*) Vol. 1, p. 473, second edition.
(*c*) N. W. P. v. 6, p. 392.

A power of enquiring into the fact of complete payment or not, is vested in the Courts in all cases." And again, that "in suits for possession of land as on absolute sale, it is not necessary in every case to prove full payment of the consideration, but there is a discretion vested in the Judge to inquire into the fact of complete payment, in any case in which it may appear necessary and just to do so, with a view to his final decision"(*a*).

The Judge of the Lower Court having held that the defendants, by executing and delivering the deeds sued upon, had rendered themselves liable for the amount in the deeds acknowledged to have been received, while at the same time he expressed an opinion that it was probable that the deeds were merely collateral to a mortgage which had never been completed,—the Court said, that the mere fact of the defendants having executed and delivered the deeds, would not justify a decree in favor of the plaintiff, if there were good reason for supposing that no consideration was received by them, and that the delivery of the deeds was obtained under a promise not fulfilled by the plaintiff: and that to hold otherwise, would afford encouragement to fraud, and be obviously inconsistent with the common principles of justice(*b*).

A suit was brought to recover Rs. 200 on a bond. The plaintiff stated in his plaint, that the bond was given on account

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(*a*) N. W. P. v. 8, p. 99; v. 9, p. 183.
(*b*) N. W. P. v. 9, p. 69.

of a cash payment. The defendant admitted the bond to be authentic, but proved that it was given on account of the mortgage of certain property to him by the plaintiff, who had failed to complete his part of the agreement, in consequence of which the defendant had received no consideration for the bond. The Court was of opinion, "that the demand on the bond could not be considered independently of the mortgage, and that the contract on the bond had become void by non-fulfilment of the conditions of the mortgage," and gave judgment for the defendant(*a*).

So long as a real *bonâ fide* consideration is proved, the Agra Court will enforce a bond, although the consideration differs from that stated.

A suit was brought to recover Rupees 725 on a bond which recited the payment of that sum to the defendant, as being the consideration for its execution. The Court said, "we gather, that although in the Judge's opinion no money, that is to say ready cash, was actually paid to the defendant at the time of his making over the bond to the plaintiff, or afterwards, yet that it was proved to his (the Judge's) satisfaction, that the defendant allowed that he duly received such money, thereby making himself responsible for the amount mentioned," and gave a decree for the plaintiff(*b*).

And in a later case, the defendant pleaded that a balance of accounts due from him was the consideration,—and not a payment of ready money as stated in the bond. But the Court was

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(*a*) N. W. P. v. 9, p. 606.

(*b*) N. W. P. v. 3, p. 250.

of opinion that this was hardly a sufficient reason for dismissing the suit; and that the plaintiff should be allowed to recover on his bond, although he had not proved his statement *literally*(a).

It appears from these authorities, that the Agra Court reserves to itself the right to enter into the question of the consideration whenever it thinks fit, even where there is no doubt as to the execution: but that the Court will rest satisfied with the statements contained in a duly executed deed, unless there is some special ground for instituting further inquiries.

The passage from Stephen's Commentaries extracted above(b), probably contains the soundest principle on which Courts can act: namely, that when a man has of his own deliberate purpose, contracted certain obligations, he will not be allowed to repudiate his deed on the ground that he acted without having received a sufficient consideration; but that he will not be bound by acts done by him under the influence of fraud, force or fear. The Calcutta Court however, as has been seen, positively refuses to recognise any such rule(c).

But though a false recital may prove fatal to the whole security, and though a true recital will not of itself always be taken as proof that there was a sufficient consideration for the agreement, still the statements in a deed which has been apparently *bonâ fide* executed by the parties to it, and in contradiction to which no very strong evidence is brought forward, will in any Court help much to establish the point to which they refer(d)

(a) N. W. P. v. 5, p. 383: *see Sup.* p. 59.
(b) *Sup.* p. 62. (c) *Sup.* p. 58; S. D. A. 1853, p. 25.
(d) N. W. P. v. 5, p. 364. S. D. A. 1856, pp. 213, 469.

Where, in a suit for foreclosure, the mortgagor pleaded no consideration, the plea was rejected, because the deed contained an acknowledgment by him of the receipt in full of the mortgage money, and he had never before disputed the fact, although fifteen years had elapsed since the execution of the deed(*a*).

And where the defendant (the borrower) pleaded, but failed fully to prove, that the consideration stated in the bond to have been paid to him, was not in fact so paid, but that certain prospective illegal interest was added to the sum really advanced, the Court gave a decree in favor of the plaintiff. "The authenticity of the bond not being denied by the borrower, it is for him to shew that any part of the amount was composed of prospective illegal interest"(*b*).

Several persons were joint tenants. Two of them signed a bond, in order to raise money to recover a portion of their joint estate, held "in ticca" by a creditor for a former debt. It was decided that the other joint tenants were also liable on the bond, though it was not signed by them, as the money raised by giving the bond, was applied for the joint use and benefit of all. "Evidence of consideration having been made severally to each partner, is not required by law. Appellants (those joint tenants who had not signed the bond) are proved to have received consideration, the money having been appropriated for their benefit and use"(*c*).

(*a*) S. D. A. 1848, p. 660. (*b*) N. W. P. v. 8, p. 734.
(*c*) S. D. A. 1855, p. 264.

CHAPTER VI.

OF THE REGISTRATION OF DEEDS.

No particular ceremony is required on the execution of a deed. It should be executed in the presence of two credible witnesses(*a*); and if it is written on several sheets of paper, and the stamp suitable to the deed is imposed on one of them, that sheet must bear the seals and signatures of the parties and witnesses(*b*).

A deed is not void simply because some of those who are named as parties to it do not sign it, and are not present at its execution by the others. In such a case the deed will, so far as circumstances admit, be binding on those who execute it, but it will not affect those who do not(*c*).

Delivery of the deed which evidences the transfer of property is not a necessary condition to the perfectness of the conveyance; but, generally speaking, delivery evidences the completeness of the transaction, and the non-delivery will ne-

(*a*) *See Supra* Chap. v. (*b*) S. D. A. 1853, p. 965.
(c) N. W. P. v. 11, p. 72.

cessarily operate very powerfully to bar the recognition of any claim founded upon the deed(*a*).

In one case, the Court rejected a deed which was produced, for the first time, long after the date on which it was alleged to have been executed, observing :—" It is not sufficient in this country, that a deed which diverts real property from the channel in which it would naturally flow, should be executed and locked up in a box. There are means of giving unquestionable validity to documents, unexpensive and easy of access, and if parties interested refuse to use them, they cannot be surprised if the documents are rejected by the Civil Courts"(*b*).

It is generally to the advantage of all parties concerned, especially of mortgagees, to give as much publicity as possible, to all contracts regarding land: and they ought to be registered and to be brought forward on any occasion on which the rights of parties in the pledged land are under discussion, —as for example when a settlement is going on(*c*).

And any collateral or other deed favourable to himself which the mortgagee may have, should be on all occasions brought forward by him, along with the mortgage deed.

A mortgagee produced an ikrarnama alleged to have been executed three days after the mortgage deed, and containing terms much more favourable to him than were those of the deed. The ikrarnama was rejected by the Court, because, when

(*a*) N. W. P. v. 4, p. 219 : *see* v. 5, p. 364.
(*b*) N. W. P. v. 5, p. 333. *See* S. D. A. 1855, p. 218.
(*c*) N. W. P. v. 5, p. 333 : v. 8, p. 542.

application was made by the mortgagee for mutation of names in the malgoozaree register, the only deed mentioned, or produced before the collector, was the mortgage deed. And the Court remarked, that if individuals will not avail themselves of the simple and obvious means afforded, of giving publicity to these transactions regarding land, they have only themselves to blame if the reality of those transactions is doubted when they are, after a lengthened interval, for the first time declared to have taken place(*a*).

The fact of a deed not having been registered, creates a presumption against its genuineness, other things being suspicious(*b*). On the other hand, a deed which has been registered and publicly made known at the time of execution, will not be set aside except on strong grounds(*c*).

The registration should be made as soon as possible after execution, and in the district where the lands lie, to which the deed refers. Registration in a different district, creates a presumption against the deed(*d*).

A deed of mortgage which has been registered, will be entitled to satisfaction in preference to any other mortgage on the same property, whether of prior or subsequent date, which may not have been registered(*e*). Where there are two deeds of sale or of mortgage, one registered, the other not, that which is registered has the preference: and it signifies nothing

(*a*) N. W. P. v. 8, p. 601.
(*b*) S. D. A. 1854, p. 529: 1855, p. 218; N. W. P. v. 10, pp. 290, 608.
(*c*) N. W. P. v. 9, p. 481. (*d*) N. W. P. v. 9, p. 149.
(*e*) Act XIX. of 1843.

that at the date of the execution of the registered deed, the seller or mortgagor was not in possession of the premises sold or mortgaged, and had no rights remaining, having parted with all his interest in the property, under the prior, but unregistered deed(*a*).

But the act gives preference to registered, over unregistered deeds, only when the deeds are of the same character; and therefore, a registered deed of sale does not take priority over an unregistered mortgage deed of earlier date,—nor *vice versâ*. And a subsequent purchaser whose deed is registered, takes the property subject to a prior mortgage though it be not registered(*b*).

The fact of the person who obtains priority of registration of his deed, having at the time of registering, full notice, or being aware, of the existence of an earlier but unregistered deed, does not prevent his deed from having the preference(*c*). The authenticity of the registered deed must be established to the satisfaction of the Court, and the Court must decide the question of authenticity, before deciding which deed is to have the preference.

Where there were two sales, the first a *bonâ fide* one, but unregistered, the second a fictitious one, but registered, it was held that the deed recording a sale which never in fact took place, and for which no consideration was paid, could not

(*a*) N. W. P. v. 8, p. 297; S. D. A. 1853, p. 245.
(*b*) S. D. A. 1852, p. 987; N. W. P. v. 7, p. 124; S. D. A. 1850, p. 77.
(*c*) Act XIX. of 1843, Sec. 2; N. W. P. v. 6, p. 266; S. D. A. 1853, p. 335. *see contra*, S. D. A. 1847, p. 525.

be considered "authentic" under the terms of the Act, and that, therefore, its being registered did not give it priority over the other. "There was no sale at all, but a mere pretence. A deed recording a fictitious sale cannot be considered authentic: an authentic document must be a record of a real or actual transaction, not of a fictitious one"(a).

It is difficult to say what the meaning of the word "authenticity" really is: but it has been distinctly ruled that, under the Act, a deed is authentic, if it represents any real transaction, however fraudulent it may be. One judge in giving his decision in the case last quoted, remarks:—"A person who, having sold his property, takes money for, and sells that property again, and the person with notice of previous sale who purchases the property, acts fraudulently, and the sale is a fraudulent one. The law however contemplates such sales, and from considerations of policy gives preference to the second deed provided it be registered. By providing further that the authenticity of the deed so preferred, must be proved, it cannot mean to bar its preference if fraudulent. But I am not prepared to say that a deed which is wholly fictitious, which records a sale which never took place, can be considered to be authentic."

The registrar must inquire into and ascertain the due execution of a deed presented to him, before admitting it to registration, but he has no right whatever to institute any inquiry as to the consideration which has passed. "The practice of

(a) S. D. A. 1853, p. 245; N. W. P. v. 9, p. 149.

making an enquiry into the payment and realisation of the consideration noted in deeds presented for régistry, is quite irregular, and should be strictly prohibited. The registrars of deeds are required to ascertain the 'due execution' of the deeds preferred to them, but have no right or power to meddle with any other points, which it is the province of the civil courts to determine"(*a*). And an acknowledgment of payment of the consideration, if made before the registrar, is a mere form, and is no evidence(*b*).

(*a*) The Agra Court (No. 803, 19th June 1850) to the Judge of Bareilly. Rep Sel. Com. on Indian Territories, 1852, Ap. p. 614.

(*b*) *N. W. P.* v. 9, p. 183. *But see* S. D. A. 1856, p. 469.

CHAPTER VII.

OF STAMPS, AND THE VALUATION OF SUITS CONNECTED WITH MORTGAGES.

I.—Of Stamps on deeds.

All mortgage deeds ought to be written on stamped paper. The Stamp Regulations do not alter the operation of the laws of property, and an unstamped deed passes the same rights as a stamped one(*a*). But until it is properly stamped, a deed cannot be used in enforcing the rights passed by it.

By Regulation X. of 1829, Sec. 3, Clause 1, it is enacted that "no deed, instrument or writing executed in any place whatsoever on the continent of India, and relating to the payment or receipt of any sum of money, or to the sale, conveyance, or transfer of any property, real or personal, being within any province or place to which this Regulation extends, or of any interest in such property, or relating to any agreement, contract, obligation, engagement or settlement, intended to have

(*a*) *See* S. D. A. 1853, p. 191. This case, however, scarcely bears out the marginal note appended to the report of it.

effect within any province or place as aforesaid (such deed, instrument or writing being of a description chargeable with stamp duty, under the rules of this or any other Regulation), shall be pleaded, given, or admitted in evidence, or otherwise received or filed in any Court of judicature or other public office, within the provinces subject to the Presidency of Fort William, unless the paper, vellum, or other material on which such deed, instrument, or writing may be written, shall be stamped with the stamp prescribed for such deed, instrument, or writing," in Schedule A. annexed to the Regulation.

As therefore, practically speaking, no deed is fully effective until it has been properly stamped, every deed ought to be written originally on stamped paper. It is true that deeds may often be stamped after execution(a), but this is not always the case, and when it is, a heavy penalty must be paid for the privilege. It is, in every respect safer and better that the deed should from the first bear the proper stamp.

In article 35 of Schedule A. referred to in the Section above set out, it is declared that every deed of mortgage or conditional sale, kut-kubala, bye-bil-wufa, bhog-banduk, &c., with or without possession given, of or for any lands, estate or property, real or personal, intended as a security for money due, or to be lent thereupon, also every deed or contract accompanied with a deposit of title deeds to any property, when the same may be made as the security for the payment of

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(a) Reg. X. of 1829, Sec 14.

money due or lent at the time, is to be charged after the same manner, and at the same rates, as if in lieu of such deed of mortgage or the like, a bond had been taken for the sum due or lent at the time. And by Article 7, the following rates are declared to be payable on bonds:—

					Rs.	A.
If or any sum not exceeding			Rs.	25	0	2
Above	Rs.	25	and not exceeding	50	0	4
,,	,,	50	,,	100	0	8
,,	,,	100	,,	200	1	0
,,	,,	200	,,	300	2	0
,,	,,	300	,,	500	4	0
,,	,,	500	,,	1,000	6	0
,,	,,	1,000	,,	2,000	10	0
,,	,,	2,000	,,	3,000	16	0
,,	,,	3,000	,,	5,000	20	0
,,	,,	5,000	,,	10,000	32	0
,,	,,	10,000	,,	20,000	40	0
,,	,,	20,000	,,	50,000	64	0
,,	,,	50,000	,,	75,000	70	0
,,	,,	75,000	,,	1,00,000	80	0
,,	,,	1,00,000	,,	1,50,000	100	0
,,	,,	1,50,000	,,	2,00,000	120	0
,,	,,	2,00,000	,,	...	150	0

and a further duty of Rupees 100 for every sum of one lakh in excess of the said amount of two lakhs of Rupees.

Deeds of mortgage given as security for the transfer of Government Securities, or for the payment of an annuity for a

fixed period, or for the delivery at a future date of any matter or thing capable of being valued, are charged at the above rates for the total amount assured, or for the *bonâ fide* value(*a*).

Deeds of mortgage given for the security of annuities for an indefinite period, are charged at the rate of ten times the annual value of the annuity(*b*).

When the total amount secured by a mortgage is unlimited, the deed may be executed on such stamp as the party may choose, but the deed is good, only for the amount covered by the stamp(*c*).

Where it is stipulated that the amount secured shall not exceed a certain sum, the deed must bear a stamp corresponding to the sum limited(*d*).

When a bond has been already taken for the amount secured, or when from any other cause, the mortgage shall act merely as a security collateral to some other transaction already charged with the *ad valorem* duty thereupon, the same being specified in the body of the deed of mortgage, the collateral deed shall be charged with a like stamp to the principal deed, if that stamp does not exceed eight rupees, which sum is the *maximum* duty on collateral instruments. And so, where more deeds than one are necessary in order to execute the mortgage in the manner desired by the parties(*e*).

(*a*) Reg. X. of 1829, Schedule A. Art. 36.

(*b*) *Ibid*, Art. 37.

(*c*) Reg. X. of 1829, Schedule. A. Art. 38.

(*d*) *Ibid*, Art. 39.

(*e*) *Ibid*, Art. 39, Note: and Art. 10.

But all such collateral deeds shall specify by their contents which other is the principal deed, and that that other is executed and stamped in the manner required. And when of several deeds or writings, a doubt shall arise as to which is the principal, the parties may determine for themselves which shall be so deemed, and may engross the same on paper stamped with the proper *ad valorem* duty(*a*).

If any instrument or writing be on more than one sheet or piece of paper, it is sufficient that one sheet shall bear the stamp, provided that the signature or seals of the parties and witnesses be thereupon. This latter proviso will be strictly enforced: and if the signatures or seals of the parties and witnesses be not on the sheet bearing the stamp, the deed is illegally executed and cannot be received in evidence(*b*).

The objection, however, is a technical one under Regulation IX. of 1854, and cannot be entertained in appeal when raised there for the first time(*c*). And if all the names except that of one witness, without whom the document would have been equally well executed and attested, be written on the stamped paper, the mere fact of the name of that one witness being written *not* on the stamped paper will not render the deed inadmissible(*d*).

When the mortgage deed contains any matter beyond that which is incidental to the mortgage, the same duties are pay-

(*a*) Reg X. of 1829, Schedule A. Art. 18, Note.
(*b*) S. D. A. 1853, p. 965 ; 1854, p. 464.
(*c*) S. D. A. 1855, p. 335.
(*d*) N. W. P. v. 9, p. 529.

able as if the mortgage and other matter had been contained in separate instruments.

A suit was brought to recover money advanced on a lease being granted. The document called itself a "ticca zur-i-peshgee," and apparently was a bond for the sum lent, with interest, accompanied by an agreement that the mortgagee should hold the lands at an annual rent of Rupees 500, to run on till the advance was paid off. The deed was stamped as a simple bond, and the mortgagee sued on it as such, seeking not to obtain possession, but only to recover the money lent by him. It was held, that this instrument required the stamp of a lease, and that it was not sufficient that it should be stamped as a bond, the stamp as a simple bond being of smaller value than that as a lease(*a*).

The stamp to be imposed on a document is the largest applicable to its nature, not that required by the nature of the suit; for example, in the case just quoted, though the instrument was sued on as a bond, it still required to bear the stamp of a lease. And from this it may be inferred, that the mere fact of the parties choosing to give up, or not to enforce, one part of the provisions of a deed, does not affect the general rule as to the stamp it must bear.

A mortgage, a zur-i-peshgee lease, contained a covenant for payment of the money advanced, on a certain date: it also

(*a*) S. D. A. 1853, p. 269; Cir. Ord. of the Board of Customs, 28th April 1852.

contained a condition that the lessee and mortgagee should pay annually, according to the fixed *kists*, without fail or excuse, the rent of Rupees 1,866 to the lessor and mortgagor, and should appropriate the remainder of the estimated assets, or Rupees 1,200 and as much more as he could collect,—the mehal not being redeemable till, either on the expiry of the prescribed term, or subsequently, the whole principal sum should be re-paid. The document was stamped as a conveyance, with a Rupees 50 stamp, which was less than the duties would have come to, had it been stamped both as a bond or mortgage, and as a lease. A suit was brought on it as a bond, for the recovery of the money advanced. The Court said, "they did not doubt that the engagement between the parties in this case, must be regarded as including two separate contracts,—the one of lease, for the annual payment to the lessor, under all circumstances, of Rupees 1,866,—the other of mortgage, as to the enjoyment by the mortgagee of the residue of the rents, after the payment of the reserved rent of Rupees 1,866, as a security for the profits or interest on the amount of his money advanced. Upon fulfilling the conditions of the lease, the lessee or mortgagee would have his right to retain the property with its remaining profits, as a security for the money lent by him; but there was a distinct and certain stipulation of prior payment of rent to the lessor (not merely of Government revenue), before the mortgage lien could attach to the residue. The document was not one which, in the case before the Court, could be broken into parts, if such a division could in any case

be made. Each of the two contracts must bear its own appropriate stamp,—or Rupees 40 for the mortgage, and Rupees 12 for the lease, calculated on the reserved rent of Rupees 1,866. The provisions of the law could not be dispensed with, merely because the two contracts were written on one paper"(a). And so, in a later case(b).

But if the double matter be immaterial, and can be treated as mere surplusage, there need be no stamp in respect of it.

A suit was brought for foreclosure, on a deed properly stamped as a mortgage deed: but it was dismissed by the lower Court, on the ground that it ought to have had a second stamp, in respect of a receipt for the consideration money which was endorsed upon it. But on appeal it was held, that such a receipt was mere surplusage, in no way affecting the mortgagee's right, as he might prove payment of the consideration, by any other evidence he might have: and that the suit lay only on the contract of conditional sale, which bore the adequate stamp(c).

This case seems to shew, that when the further matter is wholly distinct from that which is the subject of the suit, a stamp suitable to the latter, is alone necessary.

By Circular Order of 31st January 1842, No. 179, which is still in force in the North-West Provinces, if a plaintiff files either as the ground of his claim or in support of it, a document on plain paper, which ought have been on stamped

(a) S. D. A. 1853, p. 569. (b) S. D. A. 1853, p. 942.
(c) S. D. A. 1853, p. 828.

paper, he must be nonsuited. The Court has no discretion in the matter, except in very special cases. But the filing of an improperly stamped document is no ground of nonsuit. The only consequence of its not being properly stamped will be, that if the Court refuses to allow the plaintiff time to apply to the Revenue Authorities for the purpose of having the deed duly stamped, he will have to forego the advantage of making use of the deed as evidence in his cause(*a*).

When a plaintiff sets out in his plaint a deed which is collateral to the point at issue in the suit, but which is no part of the basis of his claim, the fact that such deed, though stamped, is insufficiently stamped, is immaterial. The deed of course is inadmissible in evidence until it is properly stamped(*a*).

Not only is it necessary that documents should bear stamps of the proper value, before they can be received in evidence, but such stamps must have been imposed,—in the case of a plaintiff, previous to the institution of the suit,—in the case of a defendant, previous to the filing of the plea, in support of which it is proposed to make use of the document. Stamps imposed after bringing the suit(*b*), or putting in the plea(*c*), are of no avail for the purposes of that suit or of that defence.

The Courts in the North-West Provinces seem, however, under the Circular Order which has been referred to, to have

(*a*) N. W. P. v. 10, p. 459.
(*b*) S. D. A. 1852, pp. 84, 497, 1082, 1068, *et passim.*
(*c*) S. D. A. 1852, pp. 41, 996, 1000, *et passim.*

exercised a discretionary power of allowing the plaintiff time to apply to the Revenue Authorities for the purpose of having the proper stamp affixed(*a*).

But the rule, as stated above, is very rigidly enforced in Bengal. It falls heavily on suitors, as is seen from the large number of cases reported, in which persons have had judgment given against them, solely because their documents, although properly stamped, had not been so at a sufficiently early date. The sole object of a stamp law, is the increase of the Government Revenue, and it ought, of course, to be strictly enforced: but it certainly appears that the Regulation would be more fairly construed, and that the interests of the Government would be amply provided for, if it were ruled that a document shall be properly stamped before it can be received in evidence, but that no questions shall be asked as to the date on which it was so stamped.

The value of the stamp required on a deed in which the money terms are expressed in Sicca Rupees, must be calculated on the conversion of the Sicca's into Company's Rupees(*b*). This however was not so at one time(*c*).

Sicca Rupees may be converted into Company's Rupees, by allowing 106-10-8 Company's for 100 Siccas(*d*).

It has been decided by the Calcutta Court that Act IX of 1854, has put an end to the right of special appeal on points arising under the stamp law, but not otherwise affect-

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(*a*) C. O. 31st Jan. 1842, No. 179; N. W. P. v. 10, p. 459.
(*b*) S. D. A. 1853, p. 658. (*c*) Sevestre's Rep. v. 1, p. 95.
(*d*) Cons. 1151, 27th April 1838.

ing the merits of the case as between the parties: and this, whether the objection is taken in the lower Court or not(*a*).

This is in direct opposition to the ruling of the Agra Court. By that Court the error is not treated as a *technical* one, and Act IX. of 1854 is declared to be inapplicable(*b*).

A deed which has been declared by the Revenue Authorities to be properly stamped, must be received as such by the Civil Courts, without further question(*c*).

But the precise extent to which the decisions of the Revenue Authorities are binding on the Civil Courts, cannot be considered as settled. It has been said that they are conclusive as to the amount of stamp required, but not so, as to whether a stamp is required at all or not(*d*). And it has been held by a majority of three out of five Judges that when the Sudder Court has once declared a document inadmissible for want of a stamp, it will not rescind its judgment, on the ground that subsequent to its being passed, the Revenue Authorities have decided that the deed requires no stamp(*e*).

II. Of the valuation of suits connected with mortgages, and the stamps payable on the bringing of such suits.

Section 17, Regulation X of 1829 enacts, that "in addition to the duties chargeable on deeds, instruments and writings specified in Schedule A, there shall be further levied,

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(*a*) S. D. A. 1855, pp. 222, 228, 229; 1856 p. 523; and *See* p. 469.

(*b*) N. W. P. v. 10 p. 30. *See* S. D. A. 1854, p. 529.

(*c*) S. D. A. 1852, p. 61; 1855, p. 46.

(*d*) S. D. A. 1854, pp. 109, 538.

(*e*) S. D. A. 1854, p. 538. *See* S. D. A. 1854, p. 529; 1855, p. 46.

raised, and paid, duties on law papers, *viz.*, petitions of plaint, pleadings, and the like, at the rates, and in the manner prescribed in Schedule B."

In Schedule B, Art. 8, the following rates of duty are imposed upon petitions of plaint in suits and appeals instituted in any native court, for the recovery of any sums of money, or to obtain possession of any interest, matter, or thing.

If the amount or value of the property claimed shall not						
exceed			Rs. 16	Rs.	1	0
Above Rs.	16	not exceeding,,	32	,,	2	0
,,	32	,, ,,	64	,,	4	0
,,	64	,, ,,	150	,,	8	0
,,	150	,, ,,	300	,,	16	0
,,	300	,, ,,	800	,,	32	0
,,	800	,, ,,	1,600	,,	50	0
,,	1,600	,, ,,	3,000	,,	100	0
,,	3,000	,, ,,	5,000	,,	150	0
,,	5,000	,, ,,	10,000	,,	250	0
,,	10,000	,, ,,	15,000	,,	350	0
,,	15,000	,, ,,	25,000	,,	500	0
,,	25,000	,, ,,	50,000	,,	700	0
,,	50,000	,, ,,	1,00,000	,,	1,000	0
,,	1,00,000				2,000	0

The amount or value of the property claimed, is to be ascertained according to the following rules.

If the suit is for lands paying revenue to Government, and not permanently assessed, if they form one entire mehal, or a

specific portion of a mehal with a defined jumma payable to Government in respect of that portion, the suit is to be valued at one year's jumma(*a*).

If the lands pay revenue to Government, and have been assessed in perpetuity, forming an entire mehal or a specific portion of a mehal with a defined jumma, a suit brought for them must be valued at three times the annual jumma of such mehal, or such specific portion(*a*).

If the suit is not for a specific portion of a mehal upon which portion a definite jumma has been fixed, but for a definite fractional part of the entire mehal, one jumma being assessed on the entire mehal, the suit is valued at three times the corresponding fractional part of the entire jumma(*b*).

If the lands do not pay revenue to Government, the value is laid at eighteen times the annual rent(*c*).

When the suit is for two or more distinctly assessed mouzas or mehals, the cause of action being one and the same, the value is found by adding together the sums at which each would be estimated in a separate suit for it(*d*).

A suit for possession of lands and for mesne profits is valued, as to the lands, according to the above rules, and as to the mesne profits, at the amount sued for, the aggregate of these sums being the value of such a suit(*e*).

(*a*) Reg. X. of 1829: Sch. B. Art. 8, *Note* Clause 1.

(*b*) Cons. No. 1340, W. C. 18th May; Cal. C. 17th June, 1812.

(*c*) Reg. X. of 1829; Sch. B, Art. 8, *Note* Clause 2.

(*d*) Cons. No. 577, 5th November 1850.

(*e*) S. D. A. 1849, p. 135: and *see* pp. 4, 213.

Suits for houses, gardens and other things, real or personal, not of the description above provided for, as well as for any interest in malgoozaree or revenue paying land not capable of valuation under the above rules, are to be valued at the estimated selling prices of the thing sued for(*a*).

A suit for the recovery of money due on a bond, is to be valued according to the estimated selling price of the property claimed. Therefore, if brought for the whole sum named in the bond,—or if for a less sum, but the validity of the bond is questioned and must be determined,—the suit must be valued at the amount of the whole sum for which the bond was given. And the main question of the validity of the bond, cannot be tried in any suit valued at less than the full sum covered by the bond. But if the only question is, whether the sum sued for has been paid or not, and the validity of the bond is not disputed, the suit is to be valued at the amount which the plaintiff seeks to recover, not at the whole sum covered by the bond(*b*).

The value of the principal, includes that of any subordinate right(*c*).

A mortgagor or mortgagee suing for possession on redemption or foreclosure, must lay the value of the suit, not at the sum for which the property was mortgaged,

(*a*) C. O. 23rd Aug. 1833; Sel. Rep. v. 7, p. 19; S. D. A. 1848, p. 613; Rep. Sum. Cases, 2nd Oct. 1847; Reg. X. of 1829, Sch. B, Art. 8. *Note* Clause 4.

(*b*) C. O. 61, 31st August 1832.

(*c*) Rep. Sum. Cases, 16th March 1846.

but at the value of the land, estimating it according to the rules given above. An auction purchaser at an execution sale, sued to obtain possession, by setting aside as fraudulent, a mortgage set up by a third party whom he found in possession as mortgagee. The suit was valued by the plaintiff at the annual jumma, with the addition of the money advanced on the mortgage. The Court held, that the suit was over-valued, and that it should have been estimated at the annual jumma only: and it was remarked in giving judgment that Construction No. 957 explains the meaning of Schedule B, Art. 8 to be "that the amount of the stamp shall be calculated on the value of the property, not on the sum for which the property was mortgaged," and that the stamp was to be regulated by the value of the thing claimed(*a*).

When the suit is not for possession absolutely, as on redemption or foreclosure, but is for a possession of a limited or temporary nature (as where an usufructuary mortgagee is kept out by the mortgagor, and sues for possession, the right of redemption being still subsisting), the suit is to be valued, not according to the jumma of the lands, but according to the estimated value of what the plaintiff sues for. The jumma valuation seems to be applicable to those cases only where the rights sued for are of an absolute, or of a proprietary nature.

A kutkinadar, or farmer, was ousted by his zemindar. He afterwards brought a suit to have himself re-established in his

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(*a*) N. W. P. v. 7, p. 420.

rights as kutkinadar. The Sudder Court at Agra, after a reference to that of Calcutta, decided that the plaintiff's claim being only for an interest in land during a limited period, the value must be laid at the estimated value of the injury sustained from dispossession, and that it was not to be assessed according to the jumma of the land(*a*). In a later case, the Court expressed their opinion, that suits for the possession of mortgaged lands, are analogous to suits for possession of farms. And in conformity with this ruling, it has been held, that suits brought to obtain possession of mortgaged lands, must be estimated at the value of the thing sued for, and that it is incorrect to lay the value according to the jumma(*b*).

The decision in these cases, it must be observed, is broadly laid down as applying to "suits for the possession of mortgaged property." There is however, no doubt that the possession sued for was limited in its extent—possession as farmer or as mortgagee. As to suits for absolute and final possession, the terms of the Regulation are so clear, as to admit of but one construction.

There was a simple usufructuary mortgage of a ten-annas share in the offerings made by the worshippers at a temple, the agreement being that the receipts should be taken in lieu of interest. The mortgagees sued to obtain possession as mortgagees of the share pledged to them. They valued their claim at 18

(*a*) N. W. P. v. 2, p. 217; Cons. No. 702, C. July 27, 1832, and 1101, C. Aug. 25, 1837.

(*b*) N. W. P. v. 4, p. 286; v. 6, p. 227.

times the annual proceeds, viewing the birt or right to a share in the offerings as a rent-free property. This valuation was wrong: the mortgagees should have taken as their standard of valuation, the selling price of what they considered to be their interest in the property(*a*).

When a mortgagee sues to recover the money lent by him, from the mortgagor personally, and also to set aside subsequent alienations, and to have the mortgaged property brought to sale in satisfaction of his claim, the amount in which he considers himself to be damaged by the acts of the defendants, and which it is the sole object of the suit to recover, is the sum which should regulate the valuation of the suit. The pecuniary consideration paid by any subsequent incumbrancer against whom the suit is brought, does not affect the question. Thus, where land was mortgaged for Rupees 19,000 and was afterwards, contrary to the conditions of the mortgage deed, leased to third parties for Rupees 10,000, the mortgagee suing to recover his debt, from the mortgagor personally and by sale of the property pledged, and to set aside the lease, ought to value his suit at Rupees 19,000, not at Rupees 29,000. And an opinion was expressed by the Agra Court that a case of this kind is governed by the principle laid down in Construction No. 1301, as to the manner in which suits to obtain the sale of lands in execution of a decree should be valued(*b*).

(*a*) N. W. P. v. 10, p. 341: *See* last Clause of Note on Art. 8, Sch. B, Reg. X. of 1829.

(*b*) N. W. P. v. 8, p. 341.

A mortgagee sued to recover money lent by him on a simple mortgage of certain property. By a supplemental plaint, he joined as a defendant in the suit, a person who professed to hold a conditional mortgage of prior date of the same property,—the validity of the conditional sale being thus put in issue. It was held, that the adverse right of the third party in respect of the alleged conditional mortgage, might be considered, so far as it affected the plaintiff's claim, without altering the original valuation of the suit, and that it was unnecessary to include the conditional mortgage, in computing the value to be put on the suit(*a*).

When a suit was brought in the Moonsiff's Court by a mortgagee to obtain possession of certain lands on a mortgage bond, the amount of the bond being Company's Rupees 2,000, but the suit was valued at one year's jumma of the land, which was Rupees 202,—it was held, that the fact of the amount of the bond being in excess of Rupees 300, was not of itself sufficient to place the suit beyond the Moonsiff's jurisdiction, and that it was necessary for the defendant who objected to the valuation, to show that the present value of the mortgage exceeded Rupees 300(*b*).

So in a suit brought in the Moonsiff's Court for an instalment due on a money bond. The instalments which had not yet fallen due amounted to a sum beyond the limits of the jurisdiction of a Moonsiff, but the instalment sued for was

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(*a*) S D. A. 1855, p. 277 : *See* 1852, p. 8.
(*b*) N. W. P. v. 4, p. 297.

within those limits. It was decided that, as the validity of the bond was not disputed, the suit was rightly valued at the amount of the instalment sued for, and that the Moonsiff had jurisdiction to try the cause(*a*).

It has been held by the Calcutta Court(*b*), overruling previous decisions(*c*), that in a Court of which the original jurisdiction is unlimited, overvaluation is not a valid ground for nonsuit, though if the objection is taken by the answer, it must be disposed of. "In such a controversy, the decision of the Mofussil Court would be held to determine the real value of the claim, and would settle the ordinary course of appeal, the plaintiff, as a matter of course, being cast for all costs on the excess valuation, and an appeal would lie as on an interlocutory order, as laid down in the Circular Order of 2nd February 1849."

A suit had been overvalued, so that an appeal lay to the Sudder Court at Agra, instead of to the Zillah Court. The Court, under the circumstances, and as the irregularity had not been pleaded by the defendant, disposed of the case on the merits, though they "might have remitted it after nonsuiting the plaintiffs, to the tribunal of first instance, for the purpose of being tried anew, after a correction of the above error" in the valuation(*d*).

A plaintiff who has undervalued his suit, may, before the pleadings are completed, correct his mistake by filing a duplicate plaint. But he cannot do so after the pleadings are com-

(*a*) N. W. P. v. 9, p. 539.
(*b*) S. D. A. 1855, p. 232.
(*c*) S. D. A. 1854, p. 55.
(*d*) N. W. P. v. 10, p. 341.

pleted. In one case the Agra Court ruled that "unless the plaintiff shall correct his undervaluation by means of a duplicate plaint, filed before completion of the pleadings, the defendant is entitled to a nonsuit on producing proof of the undervaluation"(*a*).

In suits of the nature described in Clause 4 of the note to Article 8, Schedule B, Regulation X. of 1829, any objection to the plaintiff's valuation of the property sued for, must be brought forward by the defendant in his answer to the plaint: and no such objection can be urged, as a matter of right, by the defendant, at a subsequent stage of the case, either in the Court of original jurisdiction, or in appeal. The question of inferior valuation could not at any time be tried by the appellate Court, except upon summary or regular appeal from the order of the inferior Court on that particular point(*b*).

But under Act IX. of 1854, the judgment of the lower Court on a plea of under-valuation cannot be reversed on appeal. The defect if it exists, is considered a technical one, and not productive of injury to either party(*c*). The appeal, however, would no doubt lie, if the undervaluation were proved to have been productive of injury.

In cases not coming under Clause 4 of the note to Article 8, it has been ruled that the Court, whether of original jurisdiction or appeal, will interfere of its own motion, whenever it becomes aware of the improper valuation. In these cases "no

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(*a*) N. W. P. v. 10, pp. 143, 355.

(*b*) Cir. Or. 161, L. P. 20th Aug., W. P. 3rd Sep. 1841; Sel. Rep. v. 6, p. 68: v. 7, pp. 284, 286; N W. P. v. 4, p. 286: v. 6, p. 227: v. 8, p. 70: v. 10, p. 143.

(*c*) S. D. A. 1854, p. 491: 1855, p. 120: N. W. P. v. 9, p. 585: v. 10, p. 355.

estimate is required, and there is no room for objection to the amount of estimate, on the part of the defendant. If the principle of the valuation is wrong, the amount is wrong: no fact remains to be ascertained, as in cases described in Clause 4, but the Court can pass the final order at once, so soon as the error is discovered. The Courts are required to take cognizance of errors of valuation, although the defendant may not have objected, so far as they can do so without exercising their judgment as to the accuracy of an estimate. Whether the principle of estimate be right or wrong, the Court cannot interfere, unless it be self-evident, or unless it be proved, after objection duly urged, that the value of the thing claimed has been understated in the proportion of 10 per cent"(*a*). The date of this decision however, is prior to that of Act IX. of 1854.

A statement by a defendant in his plea, that the enforcement of the right claimed by the plaintiff, would involve the future contingent liability to an extent of loss greater than the estimated value of the subject of claim, is no plea of under-valuation under the note to Art. 8, Schedule B., Regulation X. of 1829(*b*).

A plaintiff may if he chooses abandon a portion of his claim, so as to bring his case within the jurisdiction of an inferior Court. But the portion so relinquished is relinquished for ever(*c*).

It is not illegal, in order to make up the necessary amount, to file blank stamps with one of less than the full value, on which last alone the plaint is written(*d*).

(*a*) N. W. P. v. 4, p. 286. (*b*) N. W. P. v. 11, p. 29.
(*c*) N. W. P. v. 10, p. 545, and the Circular Orders there referred to.
(*d*) S. D. A. 1854, p. 425.

CHAPTER VIII.

OF THE RELATIVE ESTATES AND DUTIES OF THE MORTGAGOR AND THE MORTGAGEE.

On the execution of the Mortgage, the proprietary right still remains in the mortgagor, even although the possessory right may have passed to the mortgagee.

Whichever party has possession, whether he be the mortgagor, or the mortgagee, is in the position of a trustee: he is not the absolute owner of the land, but holds it subject to the rights of the other. The mortgagor must use it as liable to become the property of the mortgagee, and must not do any thing that tends to injure or diminish the security, on the strength of which he has received the money of the mortgagee. The mortgagee in possession must, as a mere trustee for the mortgagor, manage the land according to the best of his ability, regulating the expenses carefully, and applying all the profits to the satisfaction of his claim. The mortgagee is in most cases liable to account for his management, the mortgagor never is so.

The mortgagee's rights are of course always subject to any lien or incumbrance, as a lease or a mortgage, existing prior to the date of his security. And he cannot repudiate engagements binding the land, previously entered into by the mortgagor(a).

A mortgagee who is entitled to possession, has generally a right to have his name registered in the Collector's books as mortgagee, in the place of that of the mortgagor : and he has a right to appear at a revenue settlement as an objector to the settlement then made, or sometimes, as a claimant of the settlement.

A person admitted to settlement as a shareholder, and who continues recorded as lumberdar, may sue to recover his share of the produce of the estate, without first bringing a suit to establish his right to possession. His being so admitted and recorded, gives him a *primâ facie* title to be heard on the merits of his claim(b).

In a pure usufructuary martgage, the mortgagee has from the first a possessory right: but he never has any thing more, as the proprietary right remains always in the mortgagor. In simple mortgages, no proprietary or possessory right vests in the mortgagee at all, and he is not even in a position which entitles him to appear at a revenue settlement, either as a claimant, or in any other capacity(c). In mortgages by conditional sale, the proprietary right, and also, the

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(a) S. D. A. 1849, p. 341 ; N. W. P. v. 8, p. 515 : v. 9, pp. 366, 585 ; v. 10, p. 408.
(b) N. W. P. v. 10, p. 494. (c) N. W. P. v. 8, p. 45[illegible]

possessory, vest in the mortgagee, when the term fixed for the re-payment of the loan has elapsed, and the process of foreclosure been completed,—but not till then(*a*).

There was an usufructuary mortgage: and the mortgagee having been ousted, sued to recover possession on the ground of proprietary right; but the Court held, that his suit would not lie, as he had no proprietary right, and ought to have sued for possession merely as mortgagee(*b*). So in a similar case, it was said that "the appellant having failed to establish his title as absolute purchaser of the property, his suit should have been dismissed, and the entire costs of the suit should, agreeably to the established practice, have been charged to him"(*c*).

It is the duty of a mortgagor to take all legal means to protect his rights in the property mortgaged by him: and the mortgagee will be entitled to recover from him, damages for any loss he may sustain through neglect of that duty.

A mortgage was made by conditional sale, the terms being, that, if the money was not repaid by a certain date the land should pass to the mortgagee. Soon after the execution of the deed, the mortgaged estate was sold under decree, as belonging to a third party. The mortgagor put forward his claim of right in the execution sale proceeding, but it was overruled, and he never took any further steps to protect the interests of the mortgagee. The Court

(*a*) S. D. A. 1849, p. 392. (*b*) N. W. P. v. 7, p. 5.
(*c*) N. W. P. v. 11, p. 75.

held, that it was the duty of the mortgagor to have brought a suit to establish his right to the land, and that, as he had not done so, he was personally liable for the mortgage debt, while otherwise the mortgagee would have had no remedy but against the estate(*a*).

The Government revenue is a charge upon the land out of which it is payable, which takes precedence of all other claims, and consequently a mortgage does not in fact pledge any thing more than the receipts in excess of the revenue due in respect of the lands mortgaged. It is, therefore, *primâ facie*, the duty of the person who is in actual possession, and registered as proprietor, to pay the Government revenue(*b*): and any loss consequent on the neglect of this duty, must be borne by him.

Hence, if the property mortgaged by conditional sale remains in the possession of the mortgagor, and is sold for arrears of revenue (which has the effect of entirely defeating the mortgagee's security), the mortgagee may sue for, and recover from the mortgagor, the balance due to him, with interest,—instead of being left to his remedy against the land alone, as he otherwise would be(*c*).

So, on the other hand, an usufructuary mortgagee who, being in possession of the mortgaged estate, allowed the Government revenue to fall into arrears during his management, in consequence of which the Collector farmed the property for some

(*a*) S. D. A. 1853, p. 575. (*b*) S. D. A. 1852, p. 678.
(*c*) S. D. A. 1848, p. 368.

time, was held responsible for the profits of the term during which the Collector was in possession(*a*).

And a usufructuary mortgagee has no claim against the mortgagor personally, for Government revenue paid by him while in possession, although such payments will be credited to him on adjusting the accounts between them. "The mortgagee has no right of separate action for the amount so paid, while he remains in possession"(*b*).

But it is only the revenue which accrues during the time of his possession, that the mortgagee is bound to pay: all arrears fallen due before the date of his entry, remain payable by the mortgagor.

A mortgagee being in possession, the Collector came in and farmed the property, not on account of any fault or mismanagement on the part of the mortgagee, but for an old balance of revenue fallen due before the commencement of his interest as mortgagee. The mortgagee, after a time, came forward and paid up the arrears, whereupon a farming settlement of ten years was granted to him by the Collector. It was held, that the mortgagee was entitled to all the profits during these ten years, without rendering any account to the mortgagor: that he was in no way bound to pay the arrears, and having done so, must be treated as an entire stranger would have been, under similar circumstances(*c*). However, the Court expressed a

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(*a*) N. W. P. v. 8, p. 417; *See* v. 7, p. 7, and Sheodut Singh, *v.*—28th May 1845.

(*b*) S. D. A. 1852, p. 1063; *See* 1848, p. 346, and N. W. P. v. 9, p. 378.

(*c*) N. W. P. v. 7, p. 7.

doubt whether the Collector acted consistently with the spirit of Section 4, Regulation IX. of 1825, in admitting the mortgagee in possession of the defaulting mehal, to engagements as farmer by the process of transfer. Had the lease been granted, not to the mortgagee, but to a stranger, the ousting, though temporary, would no doubt have given the mortgagee a right to sue the mortgagor for immediate payment of his debt.

If one joint tenant pays the amount of Government revenue due for all, he can recover from the other joint tenants the proportions which it was their duty to have paid. And a mortgagee, being responsible for and having paid the revenue for a whole Talookah, part of which was in possession of another party, by whom the revenue for that part should have been paid, can recover the amount he has paid in excess of his own share, from the person who has made default(a).

But where a sharer had paid the Government revenue for the whole, and the persons in possession as co-sharers when the revenue accrued due, were afterwards found to have been wrongfully in possession, and the right as joint tenants declared by a decree of Court to be in certain other persons, it was held, that the latter, who were put in possession under the decree, were not liable in respect of the revenue which had been paid for their shares, because they were not in possession when it accrued due(b).

(a) N. W. P. v. 10, p. 1, *Semble;* but the case is reported almost unintelligibly.
(b) S. D. A. 1855, p. 44.

The question has been raised, but does not appear to have been actually decided, whether, if a mortgagee in possession allows the Government revenue to fall into arrear, with a view to the land being put up to sale and his becoming himself the purchaser of it, and he does in fact so become the purchaser of it, such a purchase is a good and valid one. From the observations made by the judges in one case(*a*), it rather seems that they did not consider that there would be any fraud in such a proceeding. There is, however, but little doubt that such a purchase cannot be supported. The encouragement of fraud in any shape, can never be justified on the ground of public policy: and one who, being in possession as mortgagee or trustee, fraudulently obtains the proprietary right, is to be treated as still in the position of trustee, as regards the person defrauded.

This very point has more than once come before the Supreme Court of Calcutta, and by that Court such a purchase is considered highly fraudulent, and the purchaser declared a trustee for the mortgagor. In one case(*b*), the judges expressed their opinion on the subject in the following terms:—"We continue to hold the opinion, we expressed at the hearing, that the revenue laws cannot protect such a transaction as this last: that a mortgagee in possession of an estate, and registered as its owner, who properly or

(*a*) S. D. A. 1852, p. 302.

(*b*) Raja Oojooderam Khan *v.* Aushootosh Dey and others, Supreme Court, 6th July 1852.—*Englishman*, 8th July 1852: *See* also Kelsall *v.* Freeman,—*Englishman*, 4th February 1854.

improperly suffers that estate to fall into arrear, cannot be allowed to purchase it at a Government sale, to the prejudice of his mortgagor, and so as to acquire an irredeemable interest in it. Upon such a purchase a Court of Equity on general principles will fasten a trust, and hold that the mortgagee, subject to the re-payment of the amount due on the mortgage, and of his expenses properly incurred, is a trustee for the mortgagor."

Where the agreement is, that the mortgagee shall remain in possession of the land until the principal and interest are paid from the profits, the mortgagee is bound to continue in possession so long as there is any thing due to him on the mortgage: at least, if he cannot shew good cause for not doing so, he will have no personal claim on the mortgagor for any part of his debt(*a*).

The mortgagee in possession must see to the proper management of the estate, and will be held responsible for any waste or actual damage committed or done by him, or for any deficiency in receipts arising from negligence or misconduct on his part.

A mortgagor is entitled to recover damages from his mortgagee (and also from a sub-mortgagee or any other person who has joined in the act complained of), for injury caused to the property by the acts of the mortgagee and others during the time of their being in possession(*b*). So, he may recover damages for waste committed,—as by the improper cutting

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(*a*) S. D. A. 1850, p. 44. (*b*) N. W. P. v. 7, p. 436.

down of trees(*a*). But those only are liable in damages, who have been guilty of the grievance for which redress is sought: and therefore a sub-mortgagee is not liable for damage caused before his entry(*b*).

It is the duty of the mortgagee in possession to realise balances due from the cultivators on the estate; and if these balances are lost through his negligence, they will be charged against him in taking the accounts(*c*). He must pay the wages of village chowkeedars and putwarees, and all other regular village expenses; these are altogether independent of the will of the mortgagee, and payments which he, as representative of the owner, is compelled by the orders of Government to make(*d*).

Every mortgagee in possession is bound to keep regular and accurate accounts of all sums received and expended by him in the management and preservation of the property, and if he fails to do so, the Courts make it a rule to lean against him, and to resolve all doubtful points in favor of the mortgagor(*e*).

A mortgagee "of proprietary rights," may bring a suit against one who occupies the lands as cultivator, for rent at *pergunnah* rates assumed from those paid for similar lands in the neighbourhood(*f*).

Tenants sued for arrears of rent will not be made to pay interest on those arrears, unless interest on them is stipulated

(*a*) N. W. P. v. 9, p. 1.
(*b*) N. W. P. v. 7, p. 436.
(*c*) N. W. P. v. 9, pp. 159, 371.
(*d*) N. W. P. v. 7, pp. 248, 477; v. 9, p. 371.
(*e*) N. W. P. v. 10, p. 684.
(*f*) N. W. P. v. 9, p. 537.

for in the lease, or a written demand for interest is made before suit. If it has been so demanded, it will be allowed from the date of demand(a).

A mortgagee of a share in a joint estate has no such right as entitles him to sue for a partition, even although the mortgagor acquiesces in his doing so. "The plaintiff has founded his claim on the fact that he stands in the same position as the mortgagor, and therefore that he is at liberty to sue for a division of the estate. The Court agree that in a measure he does stand in the position of the mortgagor, *i. e.*, so far as he is entitled to hold the property in the same manner as he received it from the latter: but they consider that as he has no proprietary right in the estate, he cannot sue for a division of it, the proprietors being alone the persons contemplated by the law Regulation XIX. of 1814, who are competent to make such an application." And in such a case, the mortgagee seems to be entitled only to possession as against the mortgagor of the portion of the property mortgaged to him, but without disturbance of the title of the *lumberdar* and his position thereunder, and without interruption of the existing fiscal arrangements for the collection of the revenue and general management of the estate(b).

A creditor may transfer to any third party a sum of money due to him, without previous reference to the person indebted, and without his consent. The transferee may resort to the

(a) S. D. A. 1854, p. 518. (b) N. W. P. v. 10, p. 453, and case there referred to.

same measures for the recovery of the amount of the debt, as the original creditor himself might have adopted had the transfer not taken place(a).

So there is no legal impediment whatever to the transfer by a mortgagee of his rights and interests as mortgagee, and his assignee will have in all respects the same rights and liabilities as the mortgagee himself had(b). But such a transfer must be without prejudice to the rights of the mortgagor. The mortgagee may put another person in his own position, but he cannot create a title in a third party, distinct from his own(c).

This last rule was given by the Calcutta Court as one of the grounds on which it decided that the mortgagee cannot, even in exercise of a power expressly conferred on him by the mortgage deed, sell the mortgaged property to a third person absolutely, on default being made by the mortgagor. As such a power would not enable the mortgagee himself to become absolute proprietor of the land, it was held, that for the mortgagee to exercise such a power in favor of a third party, was to create a title distinct from his own, and therefore invalid: and that, as the mortgagee's own title was one which might be made absolute with the aid of the Courts, but not otherwise, no higher right than this could be passed by him. The title passed by the mortgagee, however, when he exercises such a power, is not in fact his own right, or any part of it. A conveyance made by him under the power, is as it were the

(a) N. W. P. v. 10, p. 474. (b) S. D. A. 1848, p. 530. (c) S. D. A. 1847, p. 354.

direct act of the mortgagor, the mortgagee being only the hand by which it is made(a).

And the mortgagor may either transfer absolutely, or mortgage his remaining interest in lands which he has already mortgaged, without first redeeming them. The purchaser or mortgagee acquires the rights and interests of the mortgagor and stands in his place: he takes the property subject to the lien of the prior mortgagee, the liabilities of the property not being affected by any subsequent transfer which the mortgagor can make. And no act of the mortgagor,—nothing, in fact, but a revenue sale,—can injure the mortgagee's lien on the land, or on that which represents the land(b).

A mortgagor, after having hypothecated, or pledged certain lands by way of simple mortgage, had a settlement made which divested him, as proprietor, of all his rights, and assigned him a malikana allowance in lieu of his claims. It was contended that not only had the mortgagee no longer any claim on the land, but that the malikana allowance was not subject to his lien. But the Court held, that—" the thing pledged was not changed by the proceedings of settlement, so as to affect the mortgagee's lien, and that the pledge must be regarded as extending to any interest essentially involved in, and arising from, the interests possessed in the property by the debtor at the time of the original transactions ; and

(a) Supra. p. 33. (b) S. D. A. 1848, p. 305 ; 1850, p. 77. N. W. P. v. 6, p. 32 : v. 7, p. 138 : v. 9, pp. 371, 421 : v. 11, p. 8.

that the malikana right assigned to the mortgagor at the settlement, strictly fell within that category(*a*)."

If a first mortgagee obtains a decree against the mortgagor, and the lands are sold in execution of that decree, but do not realise more than enough to pay off the first mortgage, the auction purchaser has a title to the lands free from all incumbrances subsequent in date to the first mortgage(*b*).

The mere purchase of mortgaged property, by a third party, does not render him personally liable for the debt, to secure which the land was pledged. The lien on the property under mortgage continues, and the only effect which the purchase has on the mortgagee's position, is that it gives the purchaser, as the mortgagor's "representative," the option of redemption(*c*).

As all contracts not in themselves illegal will be enforced, a mortgagor cannot transfer his interests, in opposition to an express stipulation to the contrary, and a transfer made under such circumstances is *ipso facto* void, or at least voidable(*d*).

An agreement, however, in *general* terms, as "not to alienate any of my property until the debt has been paid,"—no property in particular being mentioned,—does not constitute a mortgage; and a *bonâ fide* purchase made from the debtor is good and cannot be set aside(*e*).

(*a*) N. W. P. v. 8, p. 669.
(*b*) N. W. P. v. 10, p. 227.
(*c*) N. W. P. v. 8, p. 316.
(*d*) N. W. P. v. 8, pp. 316, 341, 669.
(*e*) S. D. A. 1855, p. 353.

A sale within the forbidden time by a mortgagor, of property which he had pledged stipulating that during a certain period he would not sell his interest in it, was declared void and cancelled(*a*).

And where there was a condition, that any alienation of the property by the mortgagor, until liquidation of the debt secured on it, should be illegal, a mortgage previous to such liquidation, was held to be null and void(*b*).

And so, when property was pledged as a security for the honesty of the pledgor, and there was a written engagement by him not to alienate it, by gift, sale, or otherwise, till his accounts were settled, a sale made previous to such settlement, was held void as against the original pledgee(*c*).

And it would seem, that the mortgagee has a right at any time, on bringing a suit for the purpose, to have such a conveyance set aside by the Courts.

The Agra Court, has laid it down distinctly, that where there is an express stipulation in a mortgage deed not to alienate the property pledged, a subsequent conveyance of it, by lease or otherwise, involves a violation of its terms, by creating a lien which it was the express object of the stipulation to prevent; and that the mortgagee in such a case, has a good cause of action against any one, who is a party to such violation, and is entitled to a distinct declaration of the invalidity of the subsequent conveyance, without reference

(*a*) N. W. P. v. 6, p. 39. (*b*) N. W. P. v. 7, p. 614.
(*c*) S. D. A. 1848, p. 682. *See* 1851, p. 482.

to its consequences on the property, or to its effect upon the prior mortgage(a).

And the same Court has ruled that a suit may be instituted to set aside, as fraudulent, a deed of sale by which the plaintiff's title is put in jeopardy, although he has not actually been dispossessed under it(b).

There are, however, several cases in which alienations contrary to express contract, have been more leniently, and perhaps more equitably, dealt with, and considered to be bad, only in so far as they interfered with the rights of those with whom the condition not to alienate was made.

An appeal was admitted, the judge being of opinion, that "the condition of the mortgage (*viz.*, that the mortgagor should not alienate during its continuance), could never be intended to preclude the mortgagors transferring their own proprietary right to a third party, subject to the original mortgage. Of course, possession could not be decreed on such a transfer, until the full amount due to the mortgagee was paid or liquidated from the usufruct." And this view of the law was afterwards taken by the full Court and the transfer was declared to be valid, subject to the mortgagee's prior lien(c).

And when there was an agreement "not to give a *kut* or *permanent* pottâh," and that "if any sale, &c., should be made, it should be invalid," it was held, that the mere giving a

(a) N. W. P. v. 8, p. 341; v. 10, p. 227.
(b) N. W. P. v. 9, p. 517; v. 10, p. 240.
(c) S. D. A. 1848, p. 305. *So* 1851, p. 96.

mortgage by conditional sale of the land referred to, was no infringement of the contract, although if the sale were made absolute, so as wholly to alienate the property, there would then be a violation of the agreement(*a*).

So, when in a soolenamah there was a stipulation in general terms, not to alienate the property, a mortgage, made in order to save the estate from permanent alienation, was upheld. The debt for which it was mortgaged, had been incurred to save it from being sold for arrears of revenue(*b*).

An alienation contrary to express agreement cannot be pleaded by the alienor, for the purpose of avoiding his own act. The person whose interests are prejudiced by alienation, can alone put in such a plea, or have the transaction set aside(*c*).

The plaintiffs in a suit, sought to charge certain lands with monies due to them. The lands in question had been mortgaged in 1846 to the defendants, and the equity of redemption sold to them by the mortgagor in 1850. Prior to the sale in 1850, a prohibition against the alienation of the lands in question, was under Section 5, Regulation II. of 1806, issued at the instance of the plaintiffs. It was held, that the rights and interests of the mortgagor in the property attached, as they stood on the date of the issue of the prohibition against alienation, were liable to be sold by the plaintiffs in execution of the decree they had obtained for payment of the debt due to them by the mortgagor(*d*).

(*a*) S. D. A. 1851, p. 477. (*b*) N. W. P. v. 6, p. 227. (*c*) N. W. P. v. 10, p. 510. (*d*) S. D. A. 1856, p. 67. *See* N. W. P. v. 11, p. 11.

The fact of there being an existing mortgage over lands, in no way prevents the rights and interests of the mortgagor in them, from being sold by auction in execution of a decree against him. And an execution creditor should attach those rights and interests, notwithstanding their being incumbered. If he does not do so, but remains content with a temporary arrangement, such as an assignment of the rents of the estate, the mortgagor's rights may be sold, and applied in satisfaction of the debt of any other decreeholder, who may afterwards come and attach them.

A judgment creditor, instead of attaching the rights of his debtor as mortgagor of certain property, merely applied to the Court for an assignment of the rent payable to the debtor by the lessees of that property: and these rents were accordingly paid to him, so long as the lease lasted. Another judgment creditor had his debtor's rights as mortgagor put up for sale, in satisfaction of his decree. It was held, that the first creditor, having chosen to rest satisfied with another arrangement, and by his own laches allowed the rights of the mortgagor to get into the hands of another, had lost his remedy as against those rights, and that he had no claim, at law or in equity, against the second judgment creditor, or against the estate which had so passed into his hands under a legal title(*a*).

But only those rights and interests which remain to the mortgagor can be sold, and the sale of them in no way affects the mortgagee or his lien.

(*a*) N. W. P. v. 8, p. 372.

A purchaser at an auction sale in execution of a decree, is in exactly the same position as a purchaser by private contract. He takes only what the previous possessor has to give; and his acquisition is subject to all the conditions and incidents under which it was held at the date of the sale to him(*a*).

A purchaser at an auction sale is entitled to all the rents due on the date of sale, or falling due afterwards. But he cannot recover from the former proprietor arrears of revenue fallen due before the sale, which the purchaser has been obliged to pay in order to prevent the estate from being sold by Government(*b*).

An usufructuary mortgage was granted, by way of lease, two years being the term given for repayment, and there being also a stipulation that, after the lapse of that time, the mortgagee might hold on, until his claim was satisfied. It was held, that until the mortgage debt was paid, the mortgagee was entitled to possession, both before and after the expiry of the two years, even against a decreeholder(*c*).

When there was a stipulation, that the mortgage debt should be paid off on a day named, a sale of the property in execution of a decree against the mortgagor, in no degree diminished or affected the lien of the mortgagee, who was consequently not entitled to sue the mortgagor personally for the recovery of the debt, before the day fixed by the contract(*d*).

(*a*) N. W. P. v. 9, pp. 399, 559 : v. 10, p. 562 : v. 11, p. 8.
(*b*) N. W. P. v. 9, p. 344. (*c*) Sel. Rep. v. 6, p. 175. (*d*) N. W. P. v. 3, p. 209.

A mortgagee ought not, however, to remain quiet at the time of a sale of the mortgagor's rights and interests, but should give notice of his lien(*a*).

When a mortgagee comes forward, objecting to an auction sale, on account of his prior lien on the land, the existence of his claim should, time permitting it, be made known by the auctioneer to the bidders. But, as nothing is guaranteed to the purchasers at such sales, beyond the right and interest of the mortgagor, whatsoever that may be, no summary investigation is to be made into the claim of the mortgagee(*b*).

It is the duty of a mortgagor who has covenanted to put the mortgagee into possession, to do so at once, and to secure his quiet enjoyment of possession during the term agreed upon. And a mortgagor who refuses, or is unable, to give and to secure possession to an usufructuary mortgagee, renders himself liable to an immediate action for recovery of the money advanced, with interest. This has been ruled by the Privy Council, confirming a decree of the Calcutta Court.

There was an usufructuary conditional sale: the mortgage money was not repayable until the lapse of twenty years, but the mortgagee was to have possession from the date of the mortgage. Possession was withheld, and the mortgagee sued to recover the money lent by him. It was held that the mortgagee was entitled to recover, at once and without waiting till the end of the twenty years(*c*).

(*a*) N. W. P. v. 5, p. 3. (*b*) Cir. Or. 106, 4th Sept. 1840, 205, 10th June 1842.

(*c*) Sel. Rep. v. 7, p. 47, and Moore's Indian Ap. Cases, v. 4, p. 411.

A mortgage by way of lease was granted, the condition being, that the farm should continue in force until the money was repaid. Previous to payment, the mortgagor ejected the mortgagee: and the Court held that the latter might sue the mortgagor for the money, and was not restricted to a suit for possession. The mortgagor having committed a breach of contract, could not enforce fulfilment from the mortgagee of what was to be performed on his part(*a*).

In a case, which has been already referred to, of mortgage by conditional sale, the mortgaged lands were, prior to the date at which the loan was repayable, sold under decree, as belonging to a third party. The mortgagor unsuccessfully asserted his rights in the summary sale proceedings, but took no further steps to protect the mortgagee. It was decided, that as the mortgagor had neglected the duty which lay upon him of preserving his rights for the mortgagee, the latter was entitled to sue to recover the money he had advanced, and was not bound to enforce his claim against the land(*b*).

When the agreement was, that the mortgagee should be put in possession, and repay himself from the usufruct, and the mortgagor prevented his getting possession, and evaded having his name registered in the Collector's books, this was held to entitle the mortgagee to sue for his money instead of for possession(*c*).

(*a*) S. D. A. 1852, p. 193: 1853, p. 59. (*b*) S. D. A. 1853, p. 575.
(*c*) N. W. P. v. 8, p. 286.

In another case the Court delivered the following judgment:—"The deed of mortgage is of the nature of mortgage with possession, being redeemable at any time, and the original mortgagee's possession having been disturbed by the act of the mortgagors which introduced the auction purchaser in their place, such act amounted to a wrongful dispossession, and fully justified the mortgagee in bringing his suit for the amount of mortgage debt, it having been repeatedly held that when the mortgagor has committed a breach of contract, he cannot claim fulfilment by the mortgagee of what was to be performed on his part." What the terms of the mortgage contract in this case were, does not exactly appear from the report. But it seems to have been a simple usufructuary mortgage, for in another part of the judgment of the Court, it is said that the decree passed in favor of the mortgagee (for repayment of the mortgage debt) "does not carry a title to possession of the mortgaged property, but only a title to bring to sale the mortgagor's rights and interests in the estate whatever they may be. A declaration will suffice, that in execution the decreeholder will have liberty of bringing to sale those interests only which are mortgaged to him"(*a*).

But if it is the expressed intention of the parties, that the land, and the land only, shall be the source from which the mortgagee is in any event to be paid, he must bring his suit for possession, in the first instance.

(*a*) N. W. P. v. 11, p. 115.

The terms of a mortgage deed were, that the surplus proceeds of a certain talookah should be applied to the extinguishment of the mortgage debt, "and that in the event of the non-fulfilment of this condition, the mortgagee *might sue to obtain possession of the estate.*" It was held that the mortgagee could only avail himself of the remedy expressly provided for him in his deed, and must sue for possession(*a*).

By the terms of the mortgage deed, the mortgagee, who was put in possession, was to keep a certain portion of the yearly usufruct, in lieu of interest, and this he was to continue to do, until the mortgagors came forward and paid off the principal in one sum. The mortgagee, after being in possession some years, voluntarily gave it up, and brought a suit on his mortgage deed, for principal and interest. It was decided, that so long as he received the specified sum from the usufruct, he had no right to complain, or to ask for his principal, until such time as the mortgagor chose to pay it off. It was, however, also held, that if he had been dispossessed while any thing was yet due to him on the mortgage, he would have had a right to claim to be restored to the estate, or to sue without further delay for a cash payment, whichever he preferred(*b*).

There was apparently a pure usufructuary mortgage, the agreement being that the mortgagee should have possession until payment: but the money was not paid, nor did the mortgagee get possession. He therefore brought a suit for

(*a*) N. W. P. v. 3, p. 18. (*b*) N. W. P. v. 3, p. 331.

possession, and for the interest of his money during the time he had been kept out. The Court held, that the conditions of the deed shewed that the mode of payment selected by the parties, and stipulated for, was payment from the usufruct, and that the mortgagee's claim for interest was not in accordance with the terms of the deed, and must be rejected(*a*).

The question was raised whether a mortgagee by usufructuary conditional sale, who had never got possession of the property, could foreclose the mortgage, he having refused to accept a tender of the principal sum due, on the ground that he was also entitled to interest, for the time during which the usufruct was withheld from him. The Court expressed an opinion, "that if he did not obtain the possession stipulated for, it was open to him to bring a suit to enforce fulfilment of the contract, but he was not at liberty to forego this right, and to demand interest in lieu thereof, contrary to the express terms of the contract"(*b*).

In like manner any deviation by the mortgagee from the terms of his contract, entitles the mortgagor at any time to have it cancelled and to pay off his debt.

A mortgage agreement, an usufructuary conditional sale, provided that certain arable and orchard lands, portion of the mortgaged property, should continue in the possession of the mortgagor. The mortgagee, during the continuance of the mortgage term, took possession of some of the reserved orchard lands. It was held that this was such a breach as

(*a*) N. W. P. v. 3, p. 211. (*b*) N. W. P. v. 8, p. 441.

entitled the mortgagor at once, and without waiting for the day of payment originally agreed on to cancel the mortgage contract, and recover possession of the whole mortgaged property, on paying in Court the full amount of the loan. And his right to do so, is not affected by the fact that it is not expressly given to him by the mortgage deed(*a*).

There are several cases which are remarkable as showing, that a mortgage may be in abeyance for a time, without its validity being affected.

Thus, where the mortgage is of an usufructuary nature, and the Collector comes in and farms the land, not on account of any fault or mismanagement on the part of the mortgagee, the mortgage is, as respects the land, in abeyance during the Collector's possession, but will revive in full force, when he gives it up again(*b*).

So if a mortgagee purchases the remaining rights of the mortgagor, and his purchase is set aside on the ground of the mortgagor having previously disposed of those rights, the mortgagee's title *as mortgagee* will revive in full force(*c*).

(*a*) N. W. P. v. 10, p. 223.
(*b*) N. W. P. v. 7, p. 7; v. 8, p. 59; v. 10, p. 553.
(*c*) N. W. P. v. 9, p. 183.

CHAPTER IX.

OF REDEMPTION.

The mortgagor, his heirs, and assignees to whom he has transferred his *whole* interest, are entitled to redeem a mortgage. But the right to do so, exists only up to the time of the lands being sold under decree of Court in satisfaction of the mortgagee's claim, or, where the mortgage is by way of conditional sale, until the lapse of one year from the date of issue of a notice from the mortgagee, calling on the mortgagor or his representative to pay off the debt, or to be foreclosed. And redemption can never take place, until a sum equal to the amount of the principal monies advanced, with interest at 12 per cent., or at any other rate that may have been stipulated for, has been received by, or tendered to the mortgagee. If the contract was entered into before Act XXVIII. of 1855, came into force, it is not necessary to pay or tender interest at a higher rate than 12 per cent. per annum.

The payment to the mortgagee of what is due to him, must come either from the usufruct of the property pledged, or from some of those persons in whom the right of redemption

is vested: for the interest of the mortgagee in the land, is inferior only to that of the mortgagor and his representatives, and if they do not redeem, the mortgagee need not allow any one else to do so.

A mortgagee, therefore, is not bound to receive payment of the sum due to him, or to relinquish his lien, without having proof that the party offering to redeem is entitled to insist upon his right to do so. And he may put any one who claims the right, to proof of his title, not being obliged to give up his mortgage tenure to a stranger. Thus, a person claiming to redeem on the ground of inheritance from the mortgagor, must prove that he really is the heir of the mortgagor, before he can succeed in his suit(*a*).

And if the mortgagee rejects the tender of one not entitled to redeem, the mortgagor cannot afterwards claim any benefit from such tender, unless it was expressly made on his account.

A creditor having obtained a decree against his debtor, wished to put it in force by attaching and selling certain lands belonging to the latter. But the lands were in the possession of a mortgagee by conditional sale, and could not be attached. The decreeholder then deposited in Court, what was due on the mortgage, and brought a suit for redemption, in which he was unsuccessful, as it was held that he had no title to redeem. The mortgagor himself afterwards brought a suit for redemption, on the ground that the right to redeem (which would otherwise have been barred), had been kept alive by the money

(*a*) N. W. P. v. 7, p. 45.

having been tendered by the decreeholder. The Court was of opinion, that the money so deposited, could not be considered to be the money of the mortgagor, it not having been deposited on his account, or for his benefit in any way. It was not deposited with a view to save his estate from the conditional sale, but with the view of bringing it to an absolute sale by public auction, in satisfaction of the claims of the depositing party(*a*).

In this case however, the deposit, if it had been made in the mortgagor's name, or with his consent, would have been good, both as entitling the creditor to redeem, and as keeping alive the right of the mortgagor himself to do so. It would then have been the act of the mortgagor himself.

Persons to whom the mortgagor has transferred his whole interest, that is to say, purchasers *out and out*, of his equity of redemption, are entitled to redeem(*b*). It was, however, apparently not so held formerly(*c*).

But it is a matter of some uncertainty whether a subsequent mortgagee is entitled to redeem.

As regards simple mortgages, the question seems to have been but once discussed, and it was then decided that a mortgagee by conditional sale could redeem one who had a prior simple mortgage of the same property(*d*). And this decision does not violate any principle or supposed principle. For in a simple

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(*a*) Sel. Rep. v. 3, p. 54.

(*b*) S. D. A. 1853, p. 859. N. W. P. v. 9, pp. 371, 421. In N. W. P. v. 8, pp. 181, 316: v. 9, p. 1: v. 10, p. 51, the right of the purchaser of the equity of redemption is tacitly admitted. So in S. D. A. 1854, p. 1.

(*c*) S. D. A. 1847, p. 499. N. W. P. v. 6, p. 210.

(*d*) S. D. A. 1848, p. 305.

mortgage, the mortgagee never has any right in the land pledged, further than that he may have it sold in order to realize what is due to him; the only thing that he contracts for when he lends his money, is, that it shall be paid back with interest; if it is so, he gets all that he ever contracted for, and he is not prejudiced by the fact that the money he receives, comes from the hand of a subsequent mortgagee, and not from the mortgagor himself direct.

In the case of mortgages by conditional sale the opinion of the Courts seems to be that a subsequent mortgagee has no right of redemption. It has been expressly so decided by the Agra Court in one case, where in giving judgment it was said, that "the parties to a mortgage contract are mutually bound by their engagements to each other; and as the first mortgagee's contract was with his mortgagor, and with him only, or with his legal representatives, in which light the second mortgagee cannot be viewed, it is not competent to any third party to claim, or to the Courts to compel, a surrender of the tenure in whole or part, for which the first mortgagee is only answerable to the persons from whom he received it, by payment of the amount of the mortgage loan. It equally follows, that the mortgagor is not at liberty to devolve the right of redemption to a third person, not a legal representative"(a).

The Calcutta Court appears to have come indirectly to the same conclusion, in a case in which the question was, who was "legal representative" of the mortgagor, so as to entitle

(a) N. W. P. v. 8, p. 304.

him to be served with notice of foreclosure. The Regulations generally mention only "the borrower" as having the right to redeem. But Regulation XVII. of 1806, Section 7, lays down what will, in cases of conditional sale, "entitle the mortgagor and owner of the pledged property or *his legal representative* to the redemption of the property;" and Section 8 requires a year's notice to be given to "the mortgagor or *his legal representative*" before foreclosure can take place. The Court declared that no one was entitled to notice except "the mortgagor *or his legal representative*, that is, the mortgagor and the successor to and representative of, his legal estate. The notice is of long date and gives ample opportunity to all parties interested in barring a foreclosure to pay up the claim, with its due interest, of the mortgagee taking out the process: and the construction contended for, namely, that a second mortgagee is to be comprehended within the term *legal representative* for the purpose of the notice, is forced and inconsistent with the ordinary and plain meaning of the words," and long established practice(*a*). It will be observed, that this case goes no further than to decide that a second mortgagee is not the mortgagor's legal representative, for the purposes of the notice, that is to say, under Section 8. But if he is not his legal representative under Section 8, there is no ground on which it can be said that he is his legal representative under Section 7. The two sections stand together; the words "legal representative" occur in both; and there is no

(*a*) S. D. A. 1853, p. 859.

appearance of any intention to use them in two different senses. In the absence of such intention, the words ought to be interpreted alike in both sections.

That a subsequent mortgagee should not have the right of redeeming a prior mortgagee by conditional sale, if such is really the case, is a most peculiar feature in the law of mortgages. It is in direct opposition to the principle which is the basis of the rule, that a purchaser of the mortgagor's whole interest, has the same right of redemption that his vendor had. The estates of a mortgagee and of an absolute purchaser are alike, only that of the former is subject to be divested on the happening of certain events. A mortgagee is, in fact, the purchaser of the rights of the mortgagor: he buys them, but gives the mortgagor the chance of re-purchasing within a certain period. In England and in America, it has always been held, that every person being a subsequent incumbrancer, or having a legal or equitable lien on premises already subject to a mortgage, may insist on a right to redeem, on payment of the principal, interest, and costs, due to the party redeemed, he who redeems, being himself liable to be redeemed by those below him(a).

The refusal in the Courts here to recognise the right of a subsequent incumbrancer to redeem a prior one, has probably arisen from the principle being lost sight of, that the mortgage is merely a security for the debt, and collateral to it, and that if

(a) Spence's Equity Jurisprudence, v. 2, p. 665: Story's Equity Pleading, ss. 185, 186, pp. 231, 2.

the debt is paid by one who has an equity over the land, the mortgagee has got all that he had a right to, or that it was ever intended he should have. The transaction is treated by the Courts as one of absolute purchase to take effect on a certain day, but liable to become void in the event of payment by the mortgagor before that day. It is in fact dealt with, as it was in olden times by the English Courts, before the present system of equity sprung up. The terms of the contract are followed literally, and as they contain no agreement for the re-payment to the mortgagee of the money advanced by him, it is considered that he looks to be repaid by getting possession of the property pledged, and by that alone, and that he is entitled to that possession, except in the one event of the mortgagor paying him off strictly in the mode agreed upon.

A third party to whom the right has been expressly reserved in the mortgage deed, is entitled to redeem, as the mortgagor himself might have done(a). And it appears doubtful whether or not, on the right so reserved being exercised, the property will pass absolutely from the mortgagor to the person so redeeming, or whether the latter will be treated merely as a trustee for the mortgagor(b).

But a person may by his own acts deprive himself of his right to redeem. A mortgagor presented a petition in Court, stating his inability to pay off his debt, and that he had put

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(a) N. W. P. v. 3, p. 187.

(b) *See* Spence's Equity Jurisprudence, v. 2, p. 664.

the mortgagee in possession as on foreclosure. The Court seems to have been of opinion, that he was estopped by this proceeding, from afterwards redeeming; but that unless delivery of possession to the mortgagee were proved, there was nothing in what had passed, to bar the right of one claiming under an absolute purchase from the mortgagor(*a*).

A mortgagor is not entitled to redeem any portion of the property pledged without the whole debt being paid off. A mortgage transaction is one and indivisible, and the mortgagee has a lien over the whole estate, until the whole sum advanced, with interest, has been re-paid.

Four villages were together mortgaged for a certain sum: the interest of the mortgagor in two of them was afterwards sold, and the purchaser sued to redeem these two, on payment of what he considered to be the proportion of the advance secured upon them. It was held, that the charge on the four villages could not be broken up, and that the mortgagee had a lien on the two, as on the four, for the whole mortgage debt(*b*).

A single deed of mortgage, in security for an advance of rupees 2,000, was executed for two mouzas, each bearing a separate jumma. The mortgagor then applied to the revenue office for change of registry on behalf of the mortgagee, representing each mouza to have been pledged for Company's rupees 1,000. Separate applications were necessary for each mouza, by reason of their bearing separate jummas in the

(*a*) S. D. A. 1849, p. 311. (*b*) S. D. A. 1851, p. 288.

books. A few days afterwards, the mortgagee applied for registration in the usual form, making no mention of there being any separate advance or lien on *each* mouza. The Collector, however, issued the usual notification in conformity with the specification of the mortgagor. But the Court, nevertheless, held that as the deed conveyed a lien on both mouzas for the entire loan, neither of them could be redeemed without payment of the whole of that debt(*a*).

These seem to be the latest decisions to be found on this point, and are apparently sound and good(*b*). There is, however, a case reported, which is directly opposed to them.

A mortgagor having left two heirs, each entitled to succeed to one-half of his ancestor's rights, one of these heirs was declared to have the power to redeem half of the property pledged, on paying half of the balance due in respect of the mortgage debt(*c*). There can be no doubt, that this decision is quite wrong. According to the principle on which it is based, if the right of the morgagor became split up, and vested in twenty different persons, each of them would be entitled to come forward and sue to redeem the twentieth part of the property, on paying the twentieth part of the debt due; a system which would expose mortgagees to endless annoyance and litigation, and is quite opposed to the principles on which mortgage agreements are founded.

(*a*) N. W. P. v. 8, p. 473.

(*b*) *See* Spence's Equity Jurisprudence, v. 2, p. 666. (*c*) Sel. Rep. v. 4, p. 32.

A mortgagor may redeem part of the property pledged, if the debt for which the whole was mortgaged has been satisfied.

Two mouzahs were mortgaged as security for one sum, and the equity of redemption in one of these mouzahs was afterwards sold. The purchaser was held to be entitled to sue to redeem the mouzah he had bought, on the ground that the whole mortgage debt had been paid off from the usufruct of the two: and this, although the other mouzah had several years before been sold by the mortgagor to the mortgagee(*a*).

Where the mortgage deed had been executed by a minor and by his mother, who joined as guardian although the fact of her joining in that capacity did not appear on the deed, it was held that the son, on coming of age, could sue alone to redeem, without making his mother a defendant(*b*).

When two or more persons, being co-sharers, join in making a common mortgage, any one of them may redeem the property mortgaged, on payment of the whole sum due. And so may the purchaser of the rights of one of several such mortgagors(*c*).

But on the principle already observed, as to the indivisibility of a mortgage debt, no one or more of several common mortgagors, nor the purchaser from any of them, is entitled to redeem until the whole mortgage debt is paid. The mortgagor who comes forward and redeems, obtains possession of

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(*a*) N. W. P. v. 10, p. 51. (*b*) N. W. P. v. 9, p. 525.

(*c*) N. W. P. v. 6, p. 328 : v. 1, p. 81, and the cases in note (*a*) in next page:

the whole property, leaving it to the co-mortgagors who do not join in redeeming, to recover their shares from him, on paying their proportion of the mortgage debt, and of the expenses incurred in redeeming(*a*).

The joint mortgagors who redeem, have a lien on the property for the costs they have incurred in redeeming and getting possession. And there is no need for them to institute a suit to establish that lien(*b*).

Where a sharer in property mortgages not only his own share, but that of his co-sharer without his consent, the latter should sue to have the mortgage set aside, so far as it regards his share. He ought not to sue to *redeem*, for by so doing he admits that there is a valid mortgage of his share(*c*).

But although when a mortgage of an entire estate has been executed by several proprietors in one and the same transaction, an action by one proprietor to redeem his own peculiar share on paying his proportion of the loan, will, generally, not lie, yet, it is said, this rule is not without exception, and cases may occur, in which for special reasons, its enforcement may not be considered proper. And therefore, it has been held that this objection must be specially pleaded by the mortgagee in the first instance, and will not be entertained if not advanced until the case is in appeal, as the Courts will not take up an objection *suo motu*, except when it appears on the face of the proceedings that some positive law has been

(*a*) Sel. Rep. v. 3, p. 159; v. 7, p. 53. N. W. P. v. 8, pp. 481, 518; v. 9, pp. 525, 543; v. 10, p. 378; v. 11, p. 77.

(*b*) N. W. P. v. 11, p. 77.

(*c*) N. W. P. v. 9, p. 543.

infringed, in which case, and in which alone, it is their duty to interfere(a).

But the rule, that one of several common mortgagors may redeem the whole estate, and that he cannot redeem his own share *only*, does not apply, when it appears clearly on the face of the mortgage deed, that the mortgagors have each of them separate and distinct shares in the mortgage(b). In such a case, they have no claim on the mortgagee, beyond the interests which they have themselves recorded, and it would seem, that each mortgagor must redeem his own share, and that there can be no success in a suit to redeem the whole property, unless all the parties to the contract join in it.

A mortgage contract was entered into by certain persons in their own names, but in reality on behalf of, and as representing, the proprietary community of which they were the headmen. The names and shares of the real proprietors in the mortgage, were afterwards, with the consent of the headmen whose names appeared in the deed, and of the mortgagee, recorded in the administration paper of the settlement. The Court held, that any one of those so recorded as the real mortgagors, would have been entitled to redeem the whole, had it not been that the shares and rights of each were so distinctly defined as to limit the title of each, to the share registered as belonging to him(c).

(a) N. W. P. v. 8, p. 591. *See* Cir. Ord., 13th September 1843.

(b) N. W. P. v. 5, p. 220; v. 9, p. 543; v. 10, p. 378.

(c) N. W. P. v. 5, p. 220. *See* Sel. Rep. v. 7, p. 53.

From the judgment of the Court in this case, it may be inferred, that one who, though not the nominal, is the real mortgagor, and has been once recognised as such by the mortgagee, is entitled to redeem, without the co-operation of the nominal mortgagor,—that the cestuique trust can redeem without the assistance of his trustee.

There can be no redemption after foreclosure has taken place, for on foreclosure all the rights which the mortgagor had in the property pledged cease. And a suit for redemption instituted after foreclosure has been completed, must fail, except when the foreclosure suit is successfully impeached, on some of the grounds on which the Courts will set aside their own judgments,—that is to say, as a general rule, the discovery of new matter, fraud, or manifest error.

A mortgagee executed an agreement, to the effect that if the mortgagor would consent to his obtaining a decree for foreclosure, he would afterwards restore the estate to him, on certain conditions. He then brought a forelosure suit, and the mortgagor allowed a decree to pass in his favor. But the mortgagor afterwards instituted a suit to redeem, as the mortgagee refused to fulfil his contract. The Court held that his suit must be dismissed. "If the mortgagor were minded to enforce any agreement whatever with respect to his property, it was indispensably necessary that he should have done so, before suffering the property to pass absolutely away from him. Having suppressed his agreement during the suit for foreclosure, he is not

in a position to prefer any legal or equitable claim to benefit therefrom"(*a*).

It may happen, that a mortgagee in possession, may be entitled to possession in more characters than one,—that he has some other title, as well as that of mortgagee. In such a case a suit for redemption will not lie.

A sum of money having been advanced for the payment of arrears of Government revenue due on a certain puttee, the lender was put in possession for five years as mortgagee. At the end of that period, a further sum was due for arrears, which the mortgagee paid up, obtaining a further mortgage for ten years. About the time when this second lease was granted, the Revenue officers were making a new settlement of the district, and they made it in respect of the mortgaged puttee, with the mortgagee, and not with the mortgagor, the settlement being renewed with the mortgagee as farmer of the puttee for twenty years. A suit for redemption and recovery of possession, was brought by the mortgagor, at the date named as the end of the second lease, but it was held, that as the mortgagee then claimed, not as mortgagee, but as farmer under the settlement, a suit for redemption would not lie, until the termination of his farm: the settlement, if bad, must first be set aside(*b*).

So, A holding at the time a farming lease from the Government, of B's lands, advanced a sum of money to him, and received in security for the debt, a mortgage of the same

(*a*) N. W. P. v. 5, p. 294. (*b*) N. W. P. v. 6, p. 176.

property. By the terms of the mortgage contract, A was to have immediate possession and registry, and B was declared entitled to redeem after the expiration of ten years. At the close of that period, B sued for possession by redemption; but he failed, on the ground that A was in, not as mortgagee, but as Government lessee(*a*).

A mortgagor is never barred by mere lapse of time, from recovering his property, whether it be real or personal, as the limitation rule that suits are cognizable only within twelve years from the time when the cause of action arose, is applicable, only when the possession of the occupant has been under a title, *bonâ fide* believed to have conveyed a right of property to the possessor,—which the possession of a mortgagee never can be. The words of the Regulation, —and they apply to deposits or pledges of money, or other personal property, as well as to land(*b*),—are: "Provided, that no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage or deposit, wherein the occupant of the land or other property may have acquired, or held, possession thereof as mortgagee or depository only, without any proprietary right: nor in any other case whatever, wherein the possession of the actual occupant, or of those from whom his occupancy may have been derived, shall not have been under a title *bonâ fide* believed to have conveyed a right of property to the

(*a*) N. W. P. v. 8, p. 59. (*b*) Cons. 965, W. C., 7th July 1835.

possessor"(*a*). So that mere efflux of time, will not of itself bar the right to redeem a mortgage(*b*).

And therefore, when, after a lapse of many years, the representative of the mortgagor sued to redeem, the fact that neither he, nor his father, nor his grandfather, all of whom in turn represented the original mortgagor, were ever in possession of the property, was held to be no ground of objection to his succeeding in his claim(*c*).

But this rule, of course, applies only to the right to redeem the land, not to the right to recover mesne profits, or profits come to the mortgagee's hands, after the mortgage debt had been liquidated in full, and when the mortgagor might have had himself put in possession if he had chosen.

And if, after the mortgage debt has been in fact paid off, from the usufruct of the land, the mortgagor is contented to wait more than twelve years before he advances his claim to possession, he is at liberty to do so, but he will not be allowed wasilat, or mesne profits, except for the twelve years immediately preceding the institution of his suit,—in like manner as under similar circumstances, he could not claim the amount due on a bond, or the rent accrued on land(*d*).

And it is only in a *mere* redemption suit that the mortgagor has the benefit of this exception to the ordinary rule of limitation; therefore, when a party had been admitted by

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(*a*) Regulation II, of 1805, Section 3, Clause 4.

(*b*) Sel. Rep. v. 1, p. 185; v. 2, p. 4. S. D. A. 1853, p. 975; 1854, p. 400. N. W. P. v. 6, p. 203.

(*c*) N. W. P. v. 3, p. 187.

(*d*) N. W. P. v. 4, p. 298. Sel. Rep. v. 6, p. 231; v. 7, p. 182.

the Revenue Authorities to a settlement as proprietor under a *birt* title, it was held, that a suit to redeem the land, on the ground that the title of the person so admitted to the settlement was really only that of mortgagee, must be brought within twelve years from the date of the order of the Revenue officer. The Court was unanimously of opinion, that the plaintiff's (the alleged mortgagor's) cause of action, arose with the order of the settlement officers, which rejected the claim then put forward by the plaintiff as proprietor and mortgagor, and admitted his opponent to settlement as proprietor: and that, as the intermediate occupancy of the latter, which had extended over a period of more than twelve years, had been under a *boná fide* title (*i. e.*, under the order of the Revenue officers), which conveyed a right of property to the possessor, the case could not be considered as falling within the cases which are excepted by Clause 4 of Section 3, from the operation of the ordinary rule of limitation; and the claim of the plaintiff having consequently become extinguished by lapse of time, under the general rule, he was no longer in a position to contest the title of the defendant, or to put him to the proof as to whether the possession held prior to the date of settlement, was of the nature of a mortgage or otherwise (*a*).

So where the original possession was admitted to have been as mortgagees, but the mortgagees had at the settlement been entered on the register as zemindars, without any assertion of title whatever on the part of the mortgagors, it was

(*a*) N. W. P. v. 8, p. 136.

held that a redemption suit brought more than twelve years after such settlement, was barred: that it was in fact not a redemption suit, but a suit to reverse the settlement, which could not be reversed after such a lapse of time. And the Court expressed an opinion that the defendant's title was a *bonâ fide* one. "Whatever inferior interest may have been vested in them as mortgagees, previously to such settlement, became virtually superseded and extinguished, not indeed by the lapse of time, but by the new and superior right conferred on the defendants by the settlement concluded with them as zemindars, and the character of their tenure having been thus altered by a specific act, the plaintiff's cause of action is rightly held to arise from the date of such act"(*a*).

The soundness of the principles enunciated in these two cases, may however, perhaps be open to doubt.

The manner in which redemption is carried out, varies according to the nature of the mortgage. But in all cases, the right to redeem is complete, on the payment or tender to the mortgagee, or the deposit in Court, so long as the right of redemption is in existence, of the sum on payment of which the mortgage is by the contract declared to be redeemable.

A mortgage deed, and a separate deed relating to the same transaction, contained stipulations for the annual payment to the mortgagor by the mortgagee, who was to have possession, of a certain sum for *nankar* and *seer*. The mortgagor sued to redeem, and stated in his plaint that he meant to bring a separate

(*a*) N. W. P. v. 10, p. 443.

suit for arrears of the *nankar* and *seer*. It was ruled, that he was not obliged to include his claim for these arrears in the redemption suit, and that there would be no such splitting of demands, as rendered him liable to a nonsuit(*a*).

In another case it was held that the mortgagor was right in including a claim for arrears of *nankar* in a redemption suit, in which a general account was demanded. But it would seem that if the agreement for the *nankar* had been by a separate deed, a separate suit would have been necessary(*b*).

A mortgagee got possession of certain lands not included in his mortgage. The mortgagor afterwards sued to redeem, not mentioning these lands. He then brought another suit for possession of them: and it was held that this was no splitting of claims; and that the cause of action was not *one*(*c*).

A mortgagee having fraudulently excluded part of the mortgaged property from the rent roll, and entered it as rent-free, the mortgagor rightly included in his redemption suit, a prayer that this might be corrected, and that the mortgagee might be charged with the rent which ought not to have been relinquished(*d*).

In a redemption suit, the mortgagee kept back the original mortgage deed, and produced one which turned out to be a forgery. It was held, that the Court should have gone on with the case, and decided it upon secondary evidence produced by the mortgagor of what the terms of the contract were(*e*).

(*a*) N. W. P. v. 9, p. 465. (*b*) N. W. P. v. 9, p. 522.
(*c*) N. W. P. v. 9, p. 425. (*d*) N. W. P. v. 9, p. 525.
(*e*) N. W. P. v. 10, p. 69.

The tender or deposit must be of money, and the lender is not bound to accept of a teep, bond, or bill, instead of cash. However, if he does accept such a mode of payment, he cannot afterwards repudiate his acceptance.

But a strict compliance with the terms of his agreement, is all that is required of the mortgagor(*a*).

Therefore, a tender or deposit not made in cash, is good, if it was the intention of the parties, at the time of contracting, that a payment or tender so made should be sufficient. Where it appeared to be in accordance with the original intention of the parties, certain sums due from the mortgagee, were allowed to be deducted by the mortgagor from his debt, and further, a tender of Company's Paper, the nominal value of which amounted to the debt so reduced, was held a sufficient tender, without reference to the selling price of the paper. "The mortgagors have shown to the satisfaction of the Court, that they offered to pay all that was justly due at the date of making the tender, and in the mode contemplated by the lender, and they are therefore entitled" to a decree(*b*).

So, when the mortgage deed stipulates, that the mortgagor shall be entitled to redeem on paying the principal, a tender of the principal alone is sufficient. And any claim which the mortgagee may have for interest, or for other matters arising out of the mortgage transaction, must be enforced by him in a separate suit against the mortgagor. He cannot, on the ground of any such claim, oppose the mortgagor's right of redemption(*c*).

(*a*) *See* N. W. P. v. 11, p. 147. (*b*) N. W. P. v. 8, p. 417.
(*c*) N. W. P. v. 8, p. 441.

And if a good and sufficient tender is made, but is rejected by the mortgagee, he is not entitled to any interest, after the date of the tender,—while, if he is in possession of the land, he is accountable for the proceeds from that date, such proceeds being estimated according to the gross *jumma bundee.* All his rights under the mortgage contract are in fact at an end, on a proper tender being made: and interest from that date will be disallowed, even though the mortgagor does not plead his non-liability to repay it(*a*).

By Section 8, Regulation III. of 1793(*b*), all suits regarding the right to real property, must be decided in the district or zillah in which the land is situated: and this rule cannot be dispensed with, except on permission previously obtained from the Sudder Court.

A redemption suit must therefore be brought in a Court of the district in which the lands to be redeemed are situated: and if the property come within the limits of more than one zillah, leave must be obtained from the Sudder Court, to include the whole matter in one suit, in some one of the Courts which have jurisdiction(*c*).

I. As to the redemption of pure usufructuary mortgages.

1. *When the mortgage contract was entered into previous to the passing of Act XXVIII. of* 1855.

The general custom in former times seems to have been that the usufruct of the mortgaged property, however lucrative it

(*a*) N. W. P. v. 9, p. 1. (*b*) C. C. P. Reg. II., 1803, s. 5.

(*c*) S. D. A. 1858, p. 305. *See* Ras Muni Dabee, *v.* Prankishen Das, v. 4, Moore's Ind. Ap. Cases, p. 392, Post chap. x.

might be, should be taken in lieu of interest, and that there should be no redemption, until a payment or tender of the principal was made in full(a). Since the 28th of March 1780, however, the usufructuary mortgagee is confined to interest at 12 per cent. per annum, or at any lower rate which may have been agreed upon, and whatever sums are received from the land in excess of such interest, are applied to the reduction of the principal.

The regulations by which this new system was introduced, have ever since their enactment, been a very constant and fruitful source of litigation, from the difficulty of ascertaining the real amount of the mortgagee's receipts.

The judge of Mooradabad, in his report, before referred to(b) of the 5th September 1850, to the Court of Agra, says on this subject(c): "These suits are probably the most complex that come before our Courts, and to say nothing of the intricacy of the law relating to them, lead to perjuries without end on the part of the mortgagee on his swearing to the accounts produced by him according to law, to subornation of perjury on his part to support his perjury, and to all kinds of falsification of accounts. Surely it would be a very simple remedy, to revert to the old native system, *i. e.*, to let the parties abide by their contract in all its integrity, or, in other words, to place the chance of profit, more or less than 12 per cent., as it may be, against the interest." And the Court in

(a) *See* Reg. XV. 1793, s. 10.

(b) *Supra*, p. 61. Rep. Sel. Com. of the House of Commons on Ind. Territ. 1852, Ap. p. 608. (c) Para. 8.

its reply observes(a): "The Court entirely concur in the view taken by you of the baneful tendency and effects of the law relating to the redemption of mortgages, as stated in your eighth paragraph. In their judgment, usury laws are worse than useless, as they cannot be enforced, and only lead to fraud and perjury. It is to be hoped, that the Government may be induced to take the subject into consideration, and to provide by legislative proceedings, a remedy for an evil which has been the result of legislation."

By Regulation XV. of 1793, Section 10, it is enacted:— "In cases of mortgages of real property, executed prior to the twenty-eighth day of March, one thousand seven hundred and eighty, in which the mortgagee may have had the usufruct of the mortgaged property, whether he shall have held it in his own possession, or not, the usufruct is to be allowed to the mortgagee, in lieu of interest, agreeably to the former custom of the country (provided it shall have been so stipulated between the parties), until the abovementioned date, subsequent to which, the same interest is to be allowed on such mortgage bonds, and also on all bonds for the mortgage of real property, which have been entered into on or since that date, or that may be hereafter executed, as is allowed on other bonds, which have been or may be granted on, or posterior to, such date, and no more; and all such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum, with the simple interest due

(a) Para. 4.

upon it, shall have been realized from the usufruct of the mortgaged property, subsequent to the twenty-eighth day of March, one thousand seven hundred and eighty, or otherwise liquidated by the mortgagor"(*a*).

All such mortgages are, therefore, to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it, shall have been realised, from the usufruct of the property or otherwise. They are redeemable after any length of time, and no act of the mortgagee can prevent their being so.

The same rule applies to zur-i-peshgee leases, which we have seen have been decided to be of the nature of pure usufructuary mortgages, and are therefore subject to the rules which govern them(*b*).

All proceedings under Regulation XV. of 1793, Section 10, must be taken by way of regular suit, and there is no provision for disposing of cases which fall within its scope, by a summary suit(*c*).

Nothing can ever deprive the mortgagor of his right to have the accounts of the mortgagee in possession taken, not even an admission in his plaint that some thing *may possibly* still be due on the mortgage(*d*). And the *onus probandi* does not lie upon the mortgagor: that is to say, he is

(*a*) Reg. XV. of 1793, Sec. 10.; Ben. Reg. XVII. of 1806, Sec. 5.; C. C. Prov., Reg. XXXIV. of 1803, Sec. 9. All of these are repealed by Act XXVIII. of 1855, *as to contracts entered into since the passing of that Act.*

(*b*) *Supra*, p. 11.

(*c*) Cons. No. 277, 9th July 1817; Cons. No. 830, W. C., 20th September, Cal. C., 18th October 1833.

(*d*) N. W. P. v. 9, p. 371.

not bound to prove, independently of the accounts filed by the mortgagee, that the mortgage debt has been paid off(*a*). But if he fails eventually to prove that it has been satisfied, his suit will be dismissed with costs(*b*).

And a condition in a mortgage deed that the mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any degree bar the operation of the law, by which the lender is to account to the borrower for the proceeds during his possession(*c*). As a general rule, the mortgagee may be called on to account by the mortgagor at any time, on the mortgagor's allegation that the whole sum due, with interest has been received by him. And it has been held, that the mere fact that the term mentioned as that during which a zur-i-peshgee lease is to continue in force, has not yet elapsed,—or even a special agreement that the mortgagee shall remain in possession until payment of the debt is made in one sum, does not prevent the mortgage from being at an end, whenever the mortgagee has received both principal and interest(*d*).

But although the law appears to enact in the most distinct and comprehensive terms, that all usufructuary mortgages are to be considered as cancelled and redeemed *whenever* the principal sum with interest shall have been liquidated by the mortgagor, or shall have been realized from the usufruct of the mortgaged property,—and although zur-i-peshgee leases

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(*a*) S. D. A. 1855, p. 432. (*b*) N. W. P. v. 11, p. 3.
(*c*) S. D. A. 1851, p. 632; N. W. P. v. 10, pp. 51, 198. *Supra*, p. 48, 49.
(*d*) S. D. A. 1852, pp. 280, 304; N. W. P. v. 5, p. 266.

are held to be in their nature usufructuary mortgages, and governed by the rules applicable to such transactions, yet doubts have been raised as to whether or not in the case of a zur-i-peshgee lease, the lessor and mortgagor can sue for possession and an account, until the expiry of the term for which the lease has been given.

The Calcutta Court on the 15th April 1852, in a case, from the report of which it does not appear whether the term of the lease had expired or not when the suit was brought, held, that the lease in question must be declared cancelled, in pursuance of the Regulation which enacts that whenever the principal and interest have been re-paid from the usufruct, the mortgage is to be considered virtually and in effect cancelled and redeemed(*a*). And on the authority of this case, the Court, less then a fortnight afterwards, decided expressly that a zur-i-peshgee lease might be declared cancelled, prior to the expiry of the term of the lease: and it was remarked in giving a judgment, "the lease is liable to cancelment, *whenever* the principal sum with interest," has been realised by the mortgagee(*b*).

The same question, however, again arose, two months later, when a different view of it seems to have been taken. The Court said, that the precedent of the 15th April was inapplicable, as *there*, the term of the lease had expired before suit brought; and it was held that the mortgagee need not come to

(*a*) S. D. A. 1852, p. 280.
(*b*) S. D. A. 1852, p. 304.

an account, or give up possession, until the end of his lease. But although the point was raised and discussed, the judgment given by the Court, appears, after all, to have been based, not on any general principle of this kind, but on the special circumstances of the particular case before them. "We find a condition that the lessee and mortgagee shall pay annually a considerable sum certain, to the mortgagor as rent, irrespective of what he may each year realise from the property. This makes the transaction one of a peculiar nature, in which the lessee incurred a heavy risk, in consideration of which he is entitled, upon the contract of lease, to hold possession of the farm, until the expiration of the period stipulated. "This transaction, as it stands before us, is of an action brought before the period when the special lease had expired, which takes the case out of the provisions of Sections 9 and 10, Regulation XV. of 1793, whatever the effect of these may be"(*a*).

The terms of the mortgage deed were:—" that the property should remain in the possession of the mortgagee from the year 1249 to the year 1262, that all profit or loss should be his, and that no account should be rendered, nor demand made of restitution of the property, until the end of the stipulated period, and then only on paying back the principal money lent, and at the end of the year." The Agra Court decided that the mortgagee was entitled to retain possession until the expiration of the term agreed upon, and that, until then,

(*a*) S. D. A. 1852, p. 577.

the mortgagor's suit for an account would not lie. "It was held by a full bench in a former case, which was precisely similar to the one now before us, that the mortgagor could not dispossess the mortgagee from the mortgaged property until the expiration of the term agreed upon: and that the mortgagor was bound to abide by that condition in the contract which he entered into, in the absence of any proof that such contract was made with a view to evade the usury laws. And so, in the present case"(*a*).

The judgment of the Calcutta Court above referred to(*b*), rules that where the terms on which the mortgagee holds possession are such as to cause him to incur any risk of loss, he can not be called on to account or to give up possession, until the end of the lease. This decision, if under ordinary circumstances a zur-i-peshgee lease is redeemable prior to the end of the term, must be based on the principle which permits persons who run any unusually great risk of losing their money, to receive more than 12 per cent. in return.

But the mortgagor must be careful not to oust the mortgagee within the period during which he is entitled to remain in possession, unless he is prepared to show beyond doubt, that the debt has been fully paid off. If he does oust the mortgagee too soon, he renders himself personally liable to an action for the balance then due, the mortgagee being no longer restricted to his claim for possession(*c*).

(*a*) N. W. P. v. 3, p. 252. (*b*) S. D. A. 1852, p. 577.
(*c*) S. D. A. 1858, p. 59.

2. *When the mortgage contract has been entered into subsequent to the passing of Act XXVIII of* 1855.

The repeal of the usury laws has created a great change in the position of usufructuary mortgages; and agreements made since it took place, will be strictly enforced even although such as to give the mortgagee interest at a higher rate than 12 per cent. per annum.

Section 4 of Act XXVIII of 1855, enacts that a mortgage or other contract for the loan of money, whereby it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties.

By Section 5, whenever, under the Regulations of the Bengal Code, a deposit may be made of the principal sum and interest due upon any mortgage, or conditional sale, of land thereafter to be entered into, the amount of interest to be deposited shall be at the rate stipulated in the contract, or if no rate has been stipulated and interest be payable under the terms of the contract, at the rate of 12 per cent. per annum; provided, that in the latter case the amount deposited shall be subject to the decision of the Court, as to the rate at which interest shall be calculated.

By Section 6, in any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage or conditional sale of landed property, or other contract whatsoever, entered into after the passing of the Act, *interest is to be calculated at the rate stipulated therein.* If no rate of interest shall have been stipulated, and interest be payable under the terms of the contract,

it shall be calculated at such rate as the Court shall deem reasonable.

So far as they affect contracts entered into since the passing of Act XXVIII of 1855, the following Regulations are repealed. Sections 4, 6, 7, 8, 9, 10, 11, Regulation XV of 1793: Sections 3, 5, 6, 7, 8, 9, 10, Regulation XXXIV of 1803: Clause 1, Section 23, Regulation VIII of 1805, so far as it extends the application of the above mentioned Sections of Regulation XXXIV of 1803: Clauses 3, 4, 5, 6, Section 9, Regulation XIV of 1805, and so much of Section 11 as bears on the subject of usury: Section 2, Regulation VII of 1806, so far as it bears on the subject: and Sections 4 and 6 of the same Regulation.

The effect of the change is simply to bind parties strictly by the terms of the contract they have made. When the agreement is that the usufruct is to be taken in lieu of interest, the mortgagee will not be liable to account, however large his receipts may be: he will be entitled to continue in possession, until the principal is paid to him. If there is no mention of interest at all, it will be for the Court to say whether any is to be allowed, and at what rate. If any rate is mentioned, it will be calculated at that rate whatever it may be. In the two latter cases the mortgagee will be liable to account, but he will have to account only on the strict terms of his agreement.

II. As to the redemption of simple mortgages. The regulations lay down no particular rule as to the redemption of simple mortgages. In such cases, the mortgagor has

merely to tender the whole balance due to the mortgagee for principal and interest, and may then require the mortgage deed to be delivered up. He must take care to provide himself with the means of proving his having made the tender, as, in the event of its not being accepted, he may bring a suit to have the mortgage deed cancelled, he offering to pay what is due from himself. A deed of mortgage is in fact of no effect after a legal tender has been made, and all its conditions and stipulations cease from that date: and therefore, when a proper tender has been made and rejected, the mortgagee ought not to be allowed any interest after the date on which it was made, and the costs of the redemption suit, consequent on such rejection, should be thrown on him(*a*).

Simple mortgages, where the mortgagee has been in possession, are redeemable in like manner as are pure usufructuary mortgages; and, as in their case, the liabilities and position of the parties will depend very much on whether the contract was entered into before, or after, the passing of Act XXVIII of 1855.

But a simple mortgage, whether usufructuary or not, can be redeemed, only previous to the mortgagee's bringing a suit for his money, and having the property sold under decree, in satisfaction of his claim. On the land being so sold, the mortgage is of course at an end, and there can no longer be any redemption.

III. As to the redemption of mortgages by conditional sale, bye-bil-wufa, or kut kubala. When the mortgagee has not

(*a*) N. W. P. v. 9, p. 1.

had possession of the land, the mortgagor may redeem by tendering to the mortgagee or depositing in Court, the principal sum lent with the stipulated interest thereon, (not exceeding the rate of 12 per cent. per annum, if the contract was entered into before Act XXVIII of 1855 came into force) or, if interest be payable, and no rate has been stipulated for, with interest at the rate of 12 per cent.: or by tendering or depositing any less sum which is the total amount due for principal and interest. But if such smaller sum only is deposited, the mortgage will not be considered as redeemed, until it is admitted or established, that that sum covers the full amount due to the mortgagee(a).

The deposit must be made in the Dewanny Adawlut of the city or zillah in which the land is situated: and the judge receiving the same, will furnish the party who pays it in, with a written receipt for the amount, specifying the date on which, and the purpose for which, the deposit is made. The judge will, at the same time, cause a written notice of the deposit having been made, to be served on the mortgagee, and will pay to him the amount deposited, on his surrendering the bill of sale, or mortgage deed, or showing sufficient cause why it cannot be surrendered(b).

The judge's notice generally calls on the mortgagee to take the money out of court, and to deliver up the mortgage deed, and such other title deeds as he may have in his

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(a) Reg. I of 1798, Sec. 2: Reg. XXXIV 1803, Sec. 12: Act XXVIII of 1855. Sec. 5.

(b) Reg. I of 1798, Sec. 2: Reg. XXXIV 1803, Sec. 12.

possession, within a certain time,—the period named being any reasonable period, according to the distance of the mortgagee's residence, from the station from which the notice is issued(*a*).

In all cases of mortgage by conditional sale, the mortgagor may redeem at any time either before or after the day of payment named in the contract, until the end of one year from the issue of notice of foreclosure by the mortgagee. The right of the mortgagor to redeem prior to the day fixed for payment, rests on express enactment(*b*).

In mortgages, however, entered into previous to the promulgation of Regulation XVII of 1806, there can be no redemption after the date on which it was originally stipulated that the sale should become absolute if the debt was not paid. But as that Regulation has been now in force for fifty years, it is not likely that any cases will occur, which do not fall under its provisions(*c*).

The steps to be taken in redeeming a mortgage by conditional sale when the mortgagee has had possession, are the same as in cases in which there has been no such possession. There is this difference, however, between the two kinds of mortgage, that when the mortgagee has had the usufruct, the mortgagor need never deposit more than the principal sum borrowed by him, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. And if the mortgagor

(*a*) Cons. No. 974, 7th August 1835.

(*b*) Reg. I of 1798, Sec. 2. *See* Post pp. 153—157.

(*c*) Reg. XVII of 1806, Sec. 7: Cons. No. 672, 20th Jan. 1832.

deposits a sum less than that required by law, that is to say less than the principal, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and the usual notice given to the mortgagee; and if on investigation, it appears that the amount so deposited, is the total amount due, the right of redemption will have been preserved to the mortgagor, and he will be entitled to recover his lands(*a*).

The mortgagor is entitled to receive possession summarily on depositing the principal sum borrowed, leaving the interest to be settled on an adjustment of the mortgagee's receipts and disbursements during the period he has been in possession(*b*). This adjustment must be carried out by a regular suit, one of the results of which may be the mortgagor's recovering his deposit or a part of it, if it exceeded what was really due. If the mortgagor is unwilling to deposit the whole principal sum, alleging that the whole, or part of it, has been paid, he can obtain possession of his lands, only by regular suit.

In all instances in which the lender on a bye-bil-wufa, kut-kubala, or mortgage by conditional sale, has been in possession, he must account to the mortgagor for the proceeds of the estate while in his possession, in the same manner as in cases of pure usufructuary mortgage(*c*). "But such part of the Regulation, as directs that the mortgages therein referred

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(*a*) Reg. I of 1798, Secs, 2 and 3: Reg. XVII of 1806, Sec. 7.

(*b*) Cons. No. 339, 25th May 1821.

(*c*) S. D. A. 1855, p. 432. N. W. P. v. 9, p. 371. *See Supra.* pp. 138,—147.

to, are to be considered as cancelled and redeemed whenever the principal sum, with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property, or otherwise liquidated by the mortgagee, being inapplicable to conditional sales, where the mortgagee has enjoyed the usufruct, it is hereby declared not to apply thereto"(a).

The object of making the declaration contained in this clause, apparently was to show that in the case of an usufructuary mortgage by conditional sale, foreclosure may take place, which it cannot, in the case of a pure usufructuary mortgage; and that it is only when the principal with simple interest, has been realised from the usufruct or otherwise, *prior to the expiry of one year from the date of the mortgagee's issuing notice of foreclosure*, that such a mortgage will be considered virtually and in effect cancelled and redeemed. It was, in fact, intended to limit the application of the word "whenever." And its application is necessarily limited in the manner pointed out, for in all cases, if foreclosure has once taken place, the mortgagor's interest in the land is at an end, and he has no further claim of any sort on it.

If it were not that Reg. I of 1798, Sec. 2 enables the mortgagor to redeem as early as he pleases, the object of the declaration might be taken to be to recognise the right of the mortgagee to resist being redeemed prior to the day of payment named in the mortgage deed. Under the

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(a) Reg. I of 1798, latter Clause of Sec. 3.

English law the mortgagee has that right(*a*), and it is difficult to see on what principle of equity he is deprived of it.

With whatever view it was enacted, there has been a good deal of discussion and misunderstanding, as to this clause and its meaning(*b*). In one case it was argued, that its effect was to prevent a mortgagee by conditional sale, from being accountable at all. The Court said, " this exception does not mean that the lender on a bye-bil-wufa, can be entitled to more than the return of his principal and legal interest, but only that his mortgage lien is not virtually and in effect cancelled upon such return, and that the borrower must proceed according to Section 2 of Regulation I. of 1798"(*c*). But as will be hereafter seen, there is nothing to prevent a mortgagor, whether by conditional sale or otherwise, so long as he is entitled to redeem, from doing so under Section 10, Regulation XV. of 1793(*d*), if he pleases.

On one rather important point the Court of Calcutta is at variance with that of Agra :—the former having laid down that a mortgagor suing to redeem *before* the time limited in the deed of mortgage, on the ground that the mortgagee has realised his debt from the usufruct of the property, must deposit in Court the entire principal sum advanced :—the latter having ruled that there need be no deposit, when there is a denial that any balance is due.

(*a*) Coote on mortgages, p. 528.
(*b*) S. D. A. 1851, p. 632 : 1852, p. 831.
(*c*) S. D. A. 1851, p. 632.
(*d*) C. C. P. Reg. XXXIV. of 1803, Sec. 9.

It is very difficult to perceive any grounds for making a distinction between the two cases; and none appear in the following judgment, in which it is asserted, though not absolutely decided.—"The question for consideration is, whether the plaintiff, the mortgagor, having omitted to make a previous tender of any sum in repayment of the loan he received (a question which was not mooted till after the appeal was referred to a full bench), can maintain his right of action, without such tender, on the general ground, that he is entitled to call for accounts of collections made by the mortgagee in usufructuary possession, according to the rule laid down in the first part of Sec. 3, Reg. I. of 1798, and Sec. 11, Reg. XV. of 1793. We are of opinion that the plaintiff is entitled to judgment. The whole spirit and intent of Reg. I. of 1798, and of Reg. XVII. of 1806, are for the relief and security of borrowers upon conditional sales. *The requisition of a previous absolute deposit of the entire principal sum advanced, must be complied with under Reg. I. of* 1798 *where application is made for re-entry into possession before the period limited in the deed shall have expired.* When the suit is brought *after* such period, and there is a denial of any balance due, we hold that, under Sec. 7, Reg. XVII. of 1806, the mortgagor is empowered to sue for restoration of possession, without any deposit, and also under Sec. 11, Reg. XV. of 1793, to demand a rendering of accounts by the mortgagee in possession, at any time previous to final foreclosure of mortgage being carried out by the latter. The mortgagor suing without a deposit, would of course be liable to lose his

suit, if on examination of accounts a *deficit* appeared, and the smallest amount might be established to be due"(a).

The judgment of the Agra Court, in which it was decided that the process was the same in either case, appears to contain a very clear and excellent analysis of the whole law as to the redemption of usufructuary conditional sales. The mortgagor sued for redemption before the time stipulated, alleging that the debt had been paid off from the usufruct, but making no deposit. "The enactment which most clearly lays down the principles upon which a conditional seller should proceed, if he desires to redeem his estate is Reg. I. of 1798. Sec. 2(b), commences by declaring that the borrower is 'at liberty to pay the amount due, on or before the date stipulated.' This sentence provides both for the *time* at which he may pay, and also for the *amount* to be paid, that is to say, the 'amount due.' But to avoid doubts, the law goes on to declare how this 'amount due' is to be ascertained. It is at first supposed by the law to be the principal sum, with or without interest, according to circumstances. Such a deposit will secure redemption: but it by no means follows, that the deposit of even a less sum will not have the same effect, for the law goes on to say, 'provided, however, that if the borrower deposit a less sum, alleging that the sum so deposited is the total *amount due* to the lender for principal and interest, after deducting the proceeds of the lands in his possession, such deposit shall be received, and if the amount

(a) S. D. A. 1849, p. 392. (b) Reg. XXXIV. of 1803, Sec. 12.

so deposited be the total amount due, the right of redemption shall be considered to have been preserved.' Now, if the borrower has not the power of demanding an adjustment of accounts in a regular suit for redemption, the Court do not see how the provisions of this law are to be enforced. The *amount due* can be ascertained, only after deducting the proceeds of the land. There is no limit to the smallness,—it might be one rupee,—it might be nothing. Sec. 3 confirms the foregoing Section, and more particularly declares that the account is to be made up 'on the principles prescribed with regard to mortgages, as far as the same may be applicable to the nature of the case.' But there is one rule in regard to mortgages, which is not applicable to conditional sales, and the remaining part of Sec. 3 makes the exception accordingly. Were it not for this special exception, no sale could ever become absolute, the words of the mortgage law being, that 'mortgages are cancelled and redeemed *whenever* the principal with interest shall have been realised from the usufruct.' For, although a bye-bil-wufa may not have been redeemed by the usufruct or otherwise during the stipulated period, it may have been redeemed by the proceeds of the land during the years which followed the stipulated period, and if such proceeds could be taken into account, it is clear that no sale could ever become absolute. The Court see nothing in Reg. XVII. of 1806, or in any subsequent Regulation, to affect the above construction of the law. The provisions of Reg. XVII. of 1806 are *in addition to,* not in supercession of former laws, and the object of this enactment was

to give the mortgagor additional facility of redemption, by enabling him to recover possession whenever he chose to pay down the principal, with or without interest, according to circumstances, leaving the *account* to be adjusted subsequently, in a regular suit under the provisions of the law (Reg. I. of 1798) already referred to"(*a*).

These cases, however, show that both Courts are agreed in holding, that in all mortgages by conditional sale, the mortgagor *after* the period limited in the deed has expired, has the right to demand an adjustment of accounts and restoration of property, in a regular suit for redemption, without making any deposit, or without depositing more than the amount which is due, after deducting the profits of the usufructuary possession of the mortgagee, and any payments which may have been made to him(*b*).

A mortgagor seeking an account from his mortgagee, and to redeem, must aver in his plaint, that the principal sum, with interest, has been tendered or been realised from the usufruct, or otherwise(*c*). If he states an agreement to pay, and receive interest at less than 12 per cent., and it appears from his own account that the debt cannot have been paid off, if a higher rate were allowed, he must establish the agreement for the reduced interest, or his suit will be at once dismissed. If he rests his suit on an averment that at a

(*a*) N. W. P. v. 5, p. 456.

(*b*) N. W. P. v. 5, p. 456; S. D. A. 1847, p. 48: Cons. No. 339. *See* S. D. A. 1855, p. 432.

(*c*) *See* N. W. P. v. 11, p. 3: v. 9, p. 371. S. D. A. 1855, p. 432.

certain stipulated low rate of interest, the mortgage was redeemed, he cannot, on failing to establish the stipulation, go on to say, that the principal with full legal interest has been realised: there must be a direct allegation of that, in the plaint(*a*).

If it appears, from the mortgagor's own evidence, that he is not in a position to redeem in consequence of a balance being still due to the mortgagee, the suit is to be dismissed at once(*b*). So, when on investigating the accounts, the receipts from the usufruct, or these receipts together with sums deposited, or paid to the mortgagee, are found not to cover the amount due, the suit must be dismissed, however small the deficiency may be(*c*). In such cases, the Court can not give a conditional decree, as that, on payment of the balance due, the mortgage is to be held redeemed(*d*). But this is only where the mortgagor is not, according to the terms of his plaint, entitled to redeem. Therefore when it appeared in the pleadings, and was proved, that a tender of the sum due was made previous to bringing the suit, but was rejected by the mortgagee, a decree that the mortgage should be redeemed on payment of the money so tendered, was held to be good(*e*).

When a mortgagor brings a suit for redemption and an account, after service of notice of foreclosure and the expiration

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(*a*) S. D. A. 1852, p. 748. (*b*) N. W. P. v. 6, p. 221.
(*c*) S. D. A. 1849, p. 392: 1852, p. 1120; N. W. P. v. 4, p. 37: v. 5, p. 104: v. 10, p. 543.
(*d*) N. W. P. v. 10, p. 543. (*e*) N. W. P. v. 5, p. 106.

of the year of grace, he must be prepared to prove that at the date of the expiry of the year of grace, the whole sum advanced, together with interest up to that date, had been realised from the usufruct, or otherwise liquidated. And this he must do, although the mortgagee has taken no further step since issuing the notice of foreclosure(*a*).

And such a suit must be brought within twelve years from the expiry of the year of grace. On foreclosure taking place, the rights of the mortgagor are at end,—there is no longer any mortgagor. And one suing afterwards to redeem as mortgagor, must do so within twelve years from the date on which his cause of action, that, namely, which deprived him of his rights as mortgagor, arose(*b*).

(*a*) S. D. A. 1848, p. 711. (*b*) S. D. A. 1854, p. 137.

CHAPTER X.

OF THE REMEDIES OF THE MORTGAGEE, INCLUDING FORECLOSURE.

THE mortgage debt being the principal, and the land pledged being merely a security, the mortgagor, notwithstanding his breach of condition, still continues relievable from the strict letter of his contract, on payment of principal, interest and costs. But this, except in the case of pure usufructuary mortgages, is only in the event of the mortgagee not coming forward, and asking the assistance of the law to enable him to enforce his security, which assistance will be granted to him, in order that he may not remain subject to a perpetual account, or be deprived for ever of the money advanced by him. On this principle rests the doctrine of foreclosure, in the application of which, the forbearance of the law towards the mortgagor is carried very far. The mortgagee however, when once he has obtained his decree, is freed from all further uncertainty, as the foreclosure can never be opened or disturbed, on any ground, except one on which the Courts will in ordinary cases set aside their own decrees. In

England, equity is so anxious to afford every reasonable relief to the mortgagor, that even after a decree of foreclosure has been made, and the mortgagee has been in possession for many years, the Courts will, under special circumstances, open the decree,—although, after twenty years' possession, this will not readily be done(*a*).

A mortgagee must bring his suit, whether for foreclosure, for possession, or for the money he has advanced, within twelve years from the time when his cause of action arose, unless he can show by clear and positive proof, that he had, within twelve years from the commencement of his action, demanded possession or payment, and that the mortgagor had admitted the right claimed,—or that he preferred his claim within that period for the matter in dispute, to a Court of competent jurisdiction, and can assign satisfactory reasons for not proceeding with that suit,—or that, from minority, or other good cause, he had been prevented from bringing a suit(*b*).

The period of limitation as between the mortgagor and mortgagee, is therefore by no means necessarily to be calculated from the date of the mortgage deed,—in fact it never is to be calculated from that date, unless it so happens that in the particular case in question, it was on that date that the cause of action first arose. If the suit is for possession, the twelve years count from the earliest date, on which the plaintiff was entitled to possession, if for money, from the day on which he might first have sued for it. In all cases

(*a*) Coote on mortgages, p. 496.

(*b*) Regulation III. of 1793, Section 14: Regulation II. of 1803, Section 18.

where it is stipulated that the sum lent shall be paid on a certain day, and that, on default being made, the conditional sale shall become absolute, the time,—both for a suit for possession, and for a suit to recover the money advanced,—counts from the default in payment, and such suits must be brought within twelve years from that date. And, if the terms of the agreement are such that the mortgagee is entitled to possession at once, a suit for possession must be instituted within twelve years from the date of the deed(*a*).

Where the deed stated that possession had already been given to the mortgagee, who was to hold it for three years, at the end of which time the mortgagor might redeem on payment of the loan with interest, and in default of his doing so, the property was to become the mortgagee's,—it was held, that the cause of action at once arose on the failure of the mortgagee to obtain the possession agreed upon, and that as he had never been in possession, a suit for possession by him must be brought within twelve years from the date of the deed, the limitation, as regarded a suit for possession, not running merely from the default made by the mortgagor at the end of the three years(*b*).

When a lease by way of mortgage was given in consideration of an advance, and the mortgagee held possession for many years, but was afterwards ousted, and after a time sued to recover what was due on the loan with interest, the twelve

(*a*) N. W. P. v. 5, p. 239; v. 6, p. 54; v. 7, p. 322; v. 8, pp. 100, 391; v. 10, p. 243; v. 11, p. 72. Khem Chund v.—4th August 1845; Sel. Rep., v. 7, p. 77.

(*b*) N. W. P. v. 8, p. 550. *See* v. 10, p. 243.

years during which his suit would lie, were counted from the turning him out, not from the date of the deed under which he entered(a).

Certain mortgaged lands were sold by the Collector for arrears of revenue, while a suit for possession by the mortgagee was pending in the Civil Courts. The surplus proceeds of the sale were, before the possession suit was decided, appropriated by the Collector in payment of arrears on other estates belonging to the mortgagor. The mortgagee obtained a decree for possession. Within twelve years from the date of that decree, but more than twelve years from the date of the transfer made by the Collector, the mortgagee brought an action against him for the recovery of the surplus proceeds so transferred. The majority of the Court held that his suit was barred by lapse of time, and would not lie. And no doubt(b), the mortgagor's allowing the property to be sold for arrears, was such a breach of contract on his part, as gave the mortgagee an immediate right of action for the recovery of his debt. "It is argued that the decree for possession of the estate itself, forms the cause of action in the present suit, as, until that decree was passed, plaintiff could not enforce his right to possession of the estate, and consequently to the sale proceeds paid into the Collector's hands on account of it. But it appears to me, that a decree, giving to the plaintiff a right to possess and hold the estate, passed after the sale, is not *primâ facie* sufficient to determine

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(a) S. D. A. 1848, p. 722. (b) *Supra*. p. 97.

the legality of the demand of the plaintiff on the Collector for any surplus proceeds of such estate, or in itself to afford a cause of action, when those proceeds of sale had been carried to the credit of the defaulter before such decree was passed. I therefore cannot see that the decree affords in itself any date from which a time can be fixed for the law of limitation to run, and consequently the official act of the Collector in crediting the money to the defaulter is the only matter in dispute, to which I can attach the semblance of an injury accruing to the plaintiff, for which he seeks redress by this suit." "The plaintiff only succeeded to the rights of the previous proprietor in the property, by that decree, and the property having been previously sold, no rights were left for him to succeed to. It has been urged, that the excess proceeds of sale formed a surviving right. This had been transferred before the decree was made. Supposing that they had been wrongfully transferred, the former proprietor, if he had remained in possession, must have brought his suit for recovery of the money, within twelve years from that date, for which reason I hold that the plaintiff, who had only succeeded to his rights, was bound also to sue for them within twelve years from that date. As he has not done so, his suit is barred"(*a*).

The rule is of course the same, whether the transaction has been from the beginning one of mortgage, or whether being originally an absolute sale, it has afterwards been

(*a*) S. D. A. 1854, p. 182.

rendered conditional, and made redeemable on a certain date, on paying off the sum in consideration for which the deed of sale was executed.

A *birt putr* was granted, which was a deed of absolute sale, under which, if it had been unaccompanied by any other document, it would have been necessary to sue for possession within twelve years from the date of execution. But the sale was converted into a conditional one, by means of an ikrarnamah executed eight days afterwards, which gave the seller a right to redeem at the end of five years, on repaying the sum advanced to him with interest. The Court decided that the *birt putr* was virtually put in abeyance by the subsequent deed, and that the right of the purchaser under it, did not revive, until the default of the seller at the end of the five years:—that consequently no cause of action arose until the expiration of the five years, and as a suit for possession within that period could not have been entertained, a suit within twelve years from its expiry, was in time. It was further the opinion of the Court, that had the *birt putr* or the ikrarnamah contained any stipulation, that the purchaser and lender should enter on possession, the date on which he might first have entered, would be the time when his cause of action first arose, and within twelve years from which his suit must have been brought(*a*).

But in calculating the date from which limitation begins to run, care must be taken not to confound the time at which the

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(*a*) N. W. P. v. 8, p. 391: v. 9, p. 130. *See* v. 10, p. 243.

mortgage debt becomes recoverable, with the time at which some collateral debt, included in the deed, becomes due. Thus, where the mortgagor was to remain in possession at a monthly rent, and in default of payment, the mortgagee was to take possession, the mortgagor having failed in his first and all other payments, it was held that the limitation as to the mortgage debt, did not commence on these defaults(*a*).

Lands previously held rent-free, were at the settlement declared by the Revenue Authorities to be liable to assessment. No rent was paid, or sued for, for more than twelve years after this declaration. But it was held that the right to impose rent was not barred: arrears of rent for more than twelve years could not be recovered, but rent being a constantly recurring demand, the right to impose it could not be barred by lapse of time(*b*).

When the mortgage debt is made re-payable by instalments, on default of payment of any one of which the whole become payable, and the mortgagee may foreclose, limitation as regards a claim for possession, runs from the date of the first default, and a suit for foreclosure must be brought within twelve years from that date(*c*). Each separate instalment, however, is recoverable within twelve years from the date on which it fell due. And if a debtor makes payments in respect of instalments which are barred by lapse of time, he cannot afterwards say he need not have paid them, and set them off against later instalments which are not barred(*d*).

(*a*) N. W. P. v. 5, p. 239.
(*b*) N. W. P. v. 9, p. 365.
(*c*) N. W. P. v. 7, p. 322.
(*d*) N. W. P. v. 8, p. 361: v. 9, p. 477.

It is difficult to say, what will be considered to constitute an admission of the debt by the defendant, sufficient to prevent the plaintiff's claim from being barred. But it appears that an admission will not be sufficient unless it applies to the *very identical* subject matter. Thus an admission as to other property held in the same right as that for which a suit was brought, was held insufficient(*a*). And it has been ruled that the admission, before it can be held to bar the operation of the law of limitation, must be consequent on a specific demand on the part of the plaintiff who seeks to make use of it(*b*).

When the mortgagee has been in occupation of a house belonging to the mortgagor, on the understanding that the rent should be credited to the mortgagor in liquidation of the interest due on the mortgage, and the rent has accordingly been so credited up to a date within twelve years prior to the institution of the suit, this is an acknowledgment of the mortgagee's claim, sufficient to prevent the limitation rule from barring a suit by the mortgagee for possession, although it was not brought within twelve years from the date when his cause of action originally arose(*c*).

So the execution of a new bond, or the payment of a portion of the debt, within twelve years of bringing the suit (if such payment is not made as in full of all further claims, or is not accompanied by a denial of any further liability), is sufficient(*d*).

(*a*) S. D. A. 1855, p. 20. N. W. P. v. 10, pp. 338, 456, 667.

(*b*) S. D. A. 1855, p. 20. N. W. P. v. 10, p. 452. (*c*) N. W. P. v. 8, p. 27.

(*d*) S. D. A. 1847, p. 277. *See Contra* an opinion expressed in N. W. P. v. 5, p. 140.

In one case, the majority of the Court seem to have held, that an admission, coupled with a promise of payment, on a contingency which could not be fulfilled, was sufficient to prevent the operation of the limitation law(*a*).

The Calcutta Court holds that a person who is a minor when the cause of action accrues, may bring his suit at any time within twelve years from the date of his attaining his majority(*b*).

This ruling, which is in conformity with the English practice, is opposed to that of the Agra Court. That Court has held repeatedly that the plaintiff whose cause of action accrued during his minority, has not twelve years from the time of his attaining his majority, but that he must bring his suit without any unreasonable delay, on attaining majority. What does or does not constitute unreasonable delay, is left to be decided according to the circumstances of each case(*c*). In one instance three years was held to be an unreasonable delay, no sufficient cause being shown for it(*d*).

The Agra Court has also decided, that the fact of the plaintiff's being a minor when his cause of action accrued, did not prevent his claim from being barred, when his guardian had in fact instituted a suit for the matter in question, during his minority. It was said, that the plaintiff's "having sued through his guardian, showed that his minority had not prevented the prosecution of his claim"(*e*).

(*a*) S. D. A. 1854, p. 1. (*b*) S. D. A. 1855, pp. 281, 320.

(*c*) N. W. P. v. 10, pp. 56, 59, 280 : v. 11, p. 47 : but there is very little doubt that the ruling in these cases is wrong.

(*d*) N. W. P. v. 10, p. 56. (*e*) N. W. P. v. 10, p. 27.

In one case it became necessary for the Court, after grave argument, to declare its opinion that it is the minor's age, and not his guardian's, that is the question to be considered(*a*).

Proceedings taken by the mortgagee in the miscellaneous department with a view to foreclosure, cannot be considered as an application to a competent Court in regard to a claim, so as to prevent the twelve years limitation rule from having full force. The reason of this is, that in such proceedings the question of the validity or otherwise of the mortgagee's claim is not, and cannot be, in any way entered into(*b*). But a petition presented by the mortgagor in the miscellaneous department, may be used against him, if it contains any admission favorable to the mortgagee(*c*).

A suit was brought for the possession of certain lands. It appeared that one of the defendants, Nurhurree, had at one time been in the habit of paying rent for the ground in dispute to the plaintiff, and further that he (Nurhurree) had instituted a suit for possession, within twelve years of the plaintiff's bringing his action. The lower Court considered, that inasmuch as the defendant had paid rent to the plaintiff, and had sued for possession, his suit must be looked on as if it had been that of the plaintiff, and that consequently twelve years of dispossession had not elapsed without a preferring of the claim in a competent Court. But on appeal, it was decided

(*a*) S. D. A. 1855, p. 445.

(*b*) N. W. P. v. 8, p. 100; v. 7, p. 822; Cons. No. 813, August 16, 1833; S. D. A. 1854, p. 1. As to the effect of an *exparte* Revenue Settlement,—*see* N. W. P. v. 10, p. 864.

(*c*) N. W. P. v. 8, p. 288.

that, "as the defendant in *his* suit alleged that the lands belonged to Radhahinpore, whereas the plaintiff claimed them as belonging to talook Kulleanee, the duration of the litigation in the case brought by the defendant Nurhurree, could not be deducted in the calculation of the twelve years. It was necessary for the determination of the question of applicability of Section 14, Regulation III of 1793 to ascertain, not whether rents, as alleged by the defendant Nurhurree, were paid to the plaintiff, but whether, as pleaded by the defendants, they had been in adverse possession as regarded the plaintiff or not; for the payment of rents, solely, so called, was not proof of absolute possession"(*a*).

The plaintiff farmed a property from the defendant, and under-let the farm, pending the lease; the defendant ousted the under-tenant from one-half of the property, who thereupon sued the plaintiff for one-half of the advance on which he got his under-farm, and obtained a decree for the same. The plaintiff farmer then sued the landlord for one-half of the advance on which he got his farm. But the judge dismissed the suit, on the ground of lapse of time, because the sub-tenant was ousted fifteen years before the date of suit,—the ousting of the sub-tenant and not the decree obtained by him against the plaintiff, being the date at which the cause of action of the latter first arose. The ruling of the judge was upheld on appeal. "When the under-tenant instituted his suit, the plaintiff must have been aware that he was in some danger, and he

(*a*) S. D. A. 1853, p. 673.

should at once have taken steps to assert any claim he might have against his landlord, on the ground of his under-tenant having been injured. He chose to await the result of the under-tenant's suit;—not only so, after the decision of that case in 1840, from which date nine years had to run, to complete the twelve years to make the law of limitation applicable, he waited more than twelve years from the date of his under-tenant's possession, before he brought this suit against the zemindar. If plaintiff chose to see the result of the case in which his under-tenant sued him, he did so at his own risk"(*a*).

A plaintiff is not entitled to deduct from the twelve years, periods during which previous suits, brought with a similar general object, were pending, these suits having been of a varied and intermediate character, and not a continuous prosecution of the same claim. Nor can he deduct the time occupied by a suit which has been nonsuited(*b*).

The cause of action of a purchaser at a sale for arrears of revenue under Regulation XI of 1822, arises on the date of confirmation of the sale by the Board of Revenue(*c*). In the case of a purchase at a sale in execution of a decree, it arises on the sale being confirmed by the Court(*d*).

A purchaser at an execution sale found that the lands he had purchased were under farm for arrears of revenue. Many years afterwards he brought a suit to obtain possession: and it was held that as he could not have got possession until the

(*a*) S. D. A. 1854, p. 228.
(*b*) N. W. P. v. 9, pp. 543, 559. *See* S. D. A. 1854, p. 500.
(*c*) S. D. A. 1855, pp. 319, 350. (*d*) N. W. P. v. 10, p. 287.

expiry of the farm, it was not until that date that his cause of action arose(*a*).

A sued to recover an eight annas share of certain lands, and obtained a decree. In getting possession, he was opposed by B who claimed a portion of the land under a deed creating a *mokururee* tenure in his favor, and succeeded in keeping A out. More than twelve years after the date on which his right to the eight annas share accrued, but less than twelve years after the date of the decree establishing that right, A instituted a suit for the purpose of having B's deed set aside. It was held that his right of action was not barred(*b*).

A and B were joint proprietors of certain property. A's share was sold under a decree against him. The purchaser dispossessed B as well as A, and took possession of the whole property. B's cause of action arose on his being dispossessed, not the date of the decree(*c*).

In one case it was held that a mortgagee who has issued notice of foreclosure, has a further period of twelve years from the expiry of the year of grace, during which he may sue to complete the foreclosure, and to be put in possession: but that, if he lets twelve years pass without bringing his suit for foreclosure, his right is wholly lost to him(*d*).

This decision, however, is good only as to cases in which notice of foreclosure has been issued at the earliest possible

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(*a*) N. W. P. v. 9 : p. 559, v. 10, p. 81. (*b*) S. D. A. 1855, p. 261.

(*c*) N. W. P. v. 9, p. 540. *See* p. 543. The following cases bear on the subject of adverse possession. N. W. P. v. 9, pp. 345, 395 : v. 10, p. 247.

(*d*) Sel. Rep. v. 7, p. 45.

moment. As the mortgagee's cause of action arises on the mortgagor's making default, his suit for possession on foreclosure must be instituted within twelve years from the date of default: or, rather, within twelve years from the end of the year of grace, if notice of foreclosure was issued on the earliest possible day(a).

The main question, as to when the plaintiff's cause of action first arose, seems to be very often put aside, and another, and a very different one, substituted in its place, the question namely, of how long the defendant has been in undisturbed possession. And it has become a common practice, at least in the Calcutta Court, to hold that twelve years' undisturbed possession by the defendant under a *bonâ fide* title, is a bar to the suit of a plaintiff, without reference to the time when his cause of action first arose.

A mortgagor sold his rights and interests, and put the purchaser in possession. Some years afterwards, the mortgagee seems to have obtained a decree of foreclosure of his mortgage, but he did not make the purchaser who was in possession a party to the suit, and consequently was unable to turn him out. After the purchaser had been in undisturbed possession for fourteen years, the mortgagee brought a suit against him and others for possession. The majority of the Court appear to have been of opinion, that the twelve years counted from the date on which the purchaser obtained possession, and that he having been in undisturbed possession for more than twelve

(a) *See* N. W. P. v. 9, p. 234.

years, no suit would lie against him, "under the general law of limitation." But from this, one judge dissented, and held that limitation ran from the date on which the mortgagee first became entitled to sue for possession, not from the date on which the defendant first obtained possession(a).

In a very similar case,—when the mortgagor's rights had been sold under decree of Court, and the purchaser had obtained possession, the mortgagee got a decree of foreclosure in the Supreme Court, but did not make the auction purchaser a party to the suit. Within twelve years from the date of the decree, but more than twelve years from the date of the purchaser's getting possession, the mortgagee brought a suit for possession on his decree, making the purchaser defendant. The suit was dismissed, the following being the reasons severally assigned by the judges: "The defendants plead lapse of time, on the ground that they have held for above twelve years on a *bonâ fide* purchase. If the decree of the Supreme Court was good as against the present defendants, the suit would be within time, being within twelve years from the date of the decree, but the decree being altogether valueless as against the present defendants, this suit must be dismissed." "The defendants were not parties to the suit in the Supreme Court on which this claim is founded. They have shown that they purchased the property in execution of a decree of Court, and have held possession of the same for more than twelve years prior to the institution of an action in any Court for its recovery.

(a) S. D. A. 1853, p. 21.

The purchase was made in good faith and no fraud is alleged. The suit is clearly barred by the law of limitation." "The impediment which the plaintiffs seek to remove, is the possession of the defendants under a sale which took place more than twelve years before the suit was instituted: this sale must be considered the cause of action, and the law of limitation applies. The mortgagor could not contest the sale after twelve years; the person who derives from him (the mortgagee) cannot therefore be allowed that privilege"(*a*).

So, a second mortgagee having obtained a decree of foreclosure, in the zillah court, was put in possession of the mortgaged property. A year or two afterwards, the first mortgagee sued in the Supreme Court, and got a decree for foreclosure. But he did not sue for possession on that decree, until the lapse of more than twelve years from the date of the second mortgagee's getting possession, although within twelve years from the date of his own Supreme Court decree. The Court decided, that the first mortgagee's right was barred. "The effect and principle of the law of limitation is, that an unquestioned *bonâ fide* possession for twelve years, of itself creates a title of property, unless either the plaintiff can give good reason for not preferring a suit within that term, or, if he does show admissible cause for his delay, can prove that possession was originally obtained by means of force or fraud, the circumstances of which should be specially set forth, so as to be made matter of a special preliminary

(*a*) S. D. A. 1853, p. 210.

issue. The analogy of conflicting sales, of an earlier or later date, does not apply. There is, in our Regulations, a special means of obtaining a proprietary title and foreclosure, whatever may be the date of the mortgage; and the possession of a title acquired in that legal course, cannot after twelve years be disputed, except upon pleas of absolute fraud or nullity"(a).

A mortgagor sold his rights in his mortgaged lands, and then died. After his death, the purchaser's title was disputed, and unsuccessfully litigated, by the mortgagor's heirs. The mortgagee, after the purchaser had been twelve years in undisturbed possession, brought a suit for possession on foreclosure, against the purchaser and the heirs of the mortgagor. The suit would have been barred as to the heirs by lapse of time, had it not been for an admission made by them, which was considered to have revived the cause of action. The majority of the Court held, that the mortgagee's claim against the purchaser was barred. "It has been argued, that the purchaser is the representative of the mortgagor, and that, therefore, the suit if good against the mortgagor, is equally so against him; but he holds by another title than that which the mortgagee sets up in the suit, and, in fact, throughout the whole course of previous litigation, has set up a title opposed to that of the alleged heirs of the mortgagor. Of this the mortgagee was cognizant, and should, if he had any claim against the purchaser, have brought it within twelve years from his possession. Therefore, although

(a) S. D. A, 1853, p. 546.

the mortgagee is not barred from suing on the original deed of mortgage, yet as the purchaser, as an entirely distinct party, has held possession under his own adverse title for more than twelve years, such claim cannot lie either against him, or the lands in his possession"(*a*).

A suit was brought for the recovery of certain lands, and the plaintiff got a decree. In carrying out the decree, he found certain persons who had not been parties to the suit, in possession of a portion of the lands. They had been so for many years. Within twelve years from the date of his own decree, but more than twelve years after these third parties entered on possession, the plaintiff sued to establish his right as against them. It was held by a majority of the Court, that the plaintiff's cause of action arose on the date on which the defendants entered into possession, and that consequently his right of action was barred, as no fraud, &c. was shown(*b*).

It does not appear, however, under what Regulation, or on what principle, it is, that a *bonâ fide* undisturbed possession of twelve years is held of itself to create a good title, and to bar the claim of one whose suit is brought within the proper time from the origin of his cause of action. There can be no doubt that, according to the plain terms of the Regulations, it is to the time of the first accruing (or subsequent recognition, which becomes equivalent to a fresh accruing) of the plaintiff's cause of action, that the Courts are bound

(*a*) S. D. A. 1854, p. 1. (*b*) S. D. A. 1855, p. 187.

to look, and that the defendant's length of possession irrespectively of the plaintiff's right accruing, is as a general rule wholly immaterial(a). In two cases only is it material. The one is, when the sixty years limitation rule is set up. The other is, when it is wished to bring the case within the provisions of Reg. II 1805, Sec. 3, Cl. 1.

That Regulation in no way limits or affects the operation of the ordinary rule, that a suit may be brought at any time within twelve years *from the origin of the plaintiff's cause of action,* but it makes an exception in favor of plaintiffs in certain cases. It provides that a suit shall not be barred although not brought within twelve years from the date on which the cause of action arose, if the person in possession when the claim of right is preferred, shall have acquired possession by force or fraud, or if possession shall have been acquired by force or fraud by the person from whom the actual occupant derives his title, unless the actual occupant shall have held for twelve years under a just and *bonâ fide* title, believed to have conveyed a right of possession and property. If the actual occupant has held under such a title for twelve years, there is no exception to the rule that the plaintiff must sue within the usual time from the origin of his cause of action. For instance, if a plaintiff suing for possession, admits that his title to sue accrued more than twelve years previously, but alleges that he was originally ousted by force, and that therefore his claim is not barred,

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(a) *See* N. W. P. v. 9, p. 559.

the defendant may plead that whatever the nature of the plaintiff's dispossession may have been, he the defendant has held for more than twelve years under a just and *bonâ fide* title: and this will be a good plea, which, if proved, will prevent the plaintiff's suit from being exempted from the ordinary limitation rule. And it is only in such a case as this, that Reg. II 1805, Sec. 3, Cl. 1, is applicable, or that questions as to the length of the defendant's possession, can under that Regulation be entertained. In all other cases, the length of the defendant's possession is immaterial, except in so far as it throws light on the circumstances under which the plaintiff has been out of possession. And no possession on the part of the defendant can in any degree interfere with or affect those provisions of the Regulations, which except certain special cases from the operation of the twelve years rule of limitation, as on the ground of plaintiff's disability, or of defendant's admission of the right claimed: these exceptions are applicable always, whatever the defendant's possession may have been.

With reference to the observation contained in one(*a*), and supported by others, of the judgments last quoted,—that because the mortgagor could not contest the sale to his vendee after twelve years, therefore the mortgagee could not do so either,—it must be remarked, that there are very many cases, in which although the mortgagor may be unable to contest his purchaser's title, the mortgagee has a perfect right to do so.

(*a*) S. D. A. 1853, p. 210.

The title of the mortgagor is but a limited one: and the title of a purchaser from him can be no better(a). It may be that by the mortgage contract, the mortgage money is not repayable for twenty years, and that the mortgagee will, have a right of entry then,—and not till then,—if the mortgage debt is not paid off by that time. It is clear, that as the mortgagee's cause of action in such a case does not arise until the lapse of the twenty years, he has a right of suit for possession against the mortgagor, then, and for twelve years more. In like manner, as a purchaser from the mortgagor cannot possibly take more than the mortgagor had to give, he can derive from him no estate which is not liable to be foreclosed at the end of twenty years, or within twelve years therefrom. Mortgages in which the loan is made repayable at a very long date, are not uncommon, and their validity has never been questioned. But if it be law, that a purchaser from the mortgagor, who has had possession for twelve years, has got a title by prescription, the mortgagee may, through no fault of his own, be deprived of his security, and be left without a remedy. For a mortgagee by conditional sale *not* usufructuary, having no right to possession until default is made, if his mortgagor chooses to make a sale of his own rights and to put the purchaser in possession, cannot prevent him by any possible means.

When on the face of the record it appears that more than the twelve years have elapsed, the plaintiff; who considers

(a) S. D. A. 1853, p. 210.

that his right of action is not barred on the ground that his case falls under Cl. 1, Sec. 3, Reg. II of 1805, must distinctly set forth his grounds either in the plaint or in the replication. He must, on the grounds stated, *specially claim* exemption from the operation of the ordinary limitation rule. And this he must do whether the defendant has pleaded that his claim is barred or not(*a*). And it seems, that when it appears on the pleadings, that the suit is barred by lapse of time, the Court will take judicial notice of its being so, even although it is not pleaded specially by the defendant(*b*).

Before a claim, otherwise barred, can be held not to be so on the ground that it falls under Cl. 1, Sec. 3, Reg. II of 1805, the Court must find *distinctly* that there was fraud or force in the original transaction, and no twelve years' *bonâ fide* possession. The mere declaration that the original alienation was invalid, is insufficient(*c*).

A fraudulently obtained possession, and B purchased the property at an executive sale under a decree against A. More than twelve years after the dispossession by A, but less than twelve years after the purchase by B, a suit for possession was brought against the latter by C. It was held that C's right of action was not barred, B not having possessed under a *bonâ fide* title for twelve years(*d*).

Possession obtained by a mortgagee under his mortgage, is not a *banâ fide* possession, or such as can convey a permanent title(*e*).

(*a*) N. W. P. v. 10, p. 273 : S. D. A. 1855, p. 203.

(*b*) *Semble*, N. W. P. v. 10, p. 273.

(*c*) N. W. P. v. 10, p. 248.

(*d*) N. W. P. v. 9, p. 391.

(*e*) N. W. P. v. 9, p. 425.

A decree that the right to certain property is barred, extends to the right to *chur* land attached, although no special mention of the *chur* was made in the decree(*a*).

It has been held, that in cases of mortgage, as well of simple mortgage, as of mortgage by conditional sale, the cause of action of a third party (as of one who claims to be proprietor of the pledged land) arises at the date of the deed, not at the date of making the sale absolute, or of bringing the land to sale, in satisfaction of the mortgage debt. The rendering the sale absolute, or bringing the land to sale, is a mere consequence depending upon the original transfer, and not a separate transaction by itself. The injury done is complete so far as third parties are concerned, unless the mortgagor avails himself of the condition enabling him to redeem,—of his doing which, there can be no certainty(*b*).

The rule that a suit must be instituted within twelve years from the date on which the cause of action arose, will in all cases be most strictly applied. And the fact of the twelve years having expired during the Dusserah vacation, is no ground for admitting the suit on the first Court day after the vacation(*c*). But if the time expires while the Court is unexpectedly shut, as, in one instance, from the death of a near relative of the judge, the suit will be admissible on the re-opening of the Court. The closing of the Court on such an occasion, without legal authority, or public announcement, is a contingency against which the suitor cannot be expected to provide(*d*).

(*a*) S. D. A. 1855, 454.
(*b*) N. W. P. v. 6, p. 1.
(*c*) N. W. P. v. 8, p. 13: v. 10, p. 411.
(*d*) N. W. P. v. 8, p. 428.

All suits and complaints of a civil nature, are to be brought in the courts of the zillah or district within the limits of whose jurisdiction the real property to which the suit may relate shall be situated, or in other cases, the cause of action shall have arisen, or the defendant at the time when the suit may be commenced, shall reside as a fixed inhabitant(*a*).

Suits for possession on foreclosure must therefore be brought in the zillah in which the lands lie. If they are situated within the limits of more than one zillah, an application must be made to the Sudder Court, for leave to have the cause tried in one of the courts which have jurisdiction(*b*).

A suit for the recovery of money advanced on mortgage, is cognizable in the district in which the money was advanced, and not in the district where the mortgage land is situated. The loan in such cases is the cause of action(*c*). But it seems, that if it is not denied that the mortgage deed was executed within the jurisdiction of the court before which the suit is brought, and within which also the mortgaged property is situated, the suit will be entertained, although the money was not advanced, and the defendant may not have resided, within the limits of that jurisdiction(*d*).

An advance was made in Behar, both the lender and the borrower being residents of that district, on lands in Bhaugulpore. It was held that a suit to recover the sum lent, was rightly brougt in the Court of Behar. In this case, the

(*a*) Reg. III of 1793, Sec. 8; Reg. II of 1803, Sec. 5: N. W. P. v. 10, p. 4.
(*b*) *Supra*, p. 138. (*c*) N. W. P. v. 7, p. 158. (*d*) N. W P. v. 7, p. 158.

mortgage security was bad, and the lien of the mortgagee on the land had been destroyed(*a*).

It has been ruled, that when land is mortgaged to two persons jointly, in security of a sum advanced by them in equal proportions, an action by one for his share of the money will lie, although he does not make his co-mortgagee a party to the suit(*b*).

Where there was a large body of co-sharers in an estate, which had fallen into arrears and was about to be sold by Government, and certain persons saved the lands from sale, by advancing the sum required, in return for which they got a conditional sale of the property executed by thirty-nine sharers, it was held, that as this sale had been for many years recognised by the whole body of sharers, the mortgagees were entitled to foreclose the mortgage against the whole body, although it appeared that four or five sharers were not in any way parties to the execution of the original deed of mortgage(*c*).

It is only in mortgages by bye-bil-wufa, kut kubala, or conditional sale, that foreclosure can occur.

In pure usufructuary mortgages, including those by lease, the proprietary right of the mortgagor never is taken from him, nothing more than a temporary enjoyment of the land being given to the mortgagee, liable to be put an end to at any moment, on the mortgage debt being cleared off. In

(*a*) S. D. A. 1858, p. 156.
(*b*) N. W. P. v. 8, p. 91, and a case there quoted.
(*c*) N. W. P. v. 9, p. 133.

simple mortgages, and in mortgages by bye-bil-wufa, kut kubala or conditional sale, whether accompanied by possession and usufruct or not, the mortgagor may, on making default be deprived of his whole interest in the property he has pledged; but in the former case the rights of the mortgagor are, under a decree of Court, put up for sale, and transferred to whosoever may be declared the purchaser: in the latter, foreclosure takes place, that is to say, all the interest of the mortgagor in the mortgage lands ceases, and passes directly from him to the mortgagee.

The mortgagee is bound by the terms of his contract, and cannot sue to foreclose, or to have his debt paid, or the land sold in satisfaction of it, until the time fixed by the contract for the re-payment of the loan has passed(*a*).

I. In a case of simple mortgage, the mortgagee may bring his suit at any time (except where the ordinary limitation rules intervene) after the debt has become due according to the terms of the agreement, and no notice of the intention to sue need be given to the mortgagor, more than is required to be given to the defendant in any ordinary suit. The suit is brought for the recovery of the sum lent, with interest and costs, but the mortgage deed should be set out in the plaint, so as to show that the debt is something more than a simple money debt. The Court after inquiring into the amount remaining due, will give a decree for it. If the mortgagor does not pay the sum decreed, the mortgagee must apply to

(*a*) *See* S. D. A. 1854, p. 507.

the Court to have the pledged land sold in execution; and the Court will order that the rights and interest of the mortgagor in the land, such as they were at the date of the mortgage deed, shall be sold. Any surplus which remains after liquidating the debt, belongs to the mortgagor.

The decree is always against the mortgagor personally, and if the land does not produce a sufficient sum, the mortgagee may still proceed against the mortgagor for the residue unpaid, as an ordinary decree-holder. And so, if the mortgagee chooses in the first instance to proceed against the mortgagor alone, he may afterwards, if his debt is not satisfied, enforce his claim on the land.

A person on borrowing a sum of money, gave his bond for it: and the bond also pledged certain property, providing that any sale or mortgage of it until the lender's claim was satisfied in full, should be invalid. The lender afterwards brought a suit for the money in the Supreme Court, and obtained a decree. He attempted to execute his decree, as an ordinary judgment creditor, on the property pledged, but was resisted by some intermediate incumbrancers whom he found in possession. He then instituted a suit in a Mofussil Court to realise the sum which had been decreed to him, by setting aside the intermediate incumbrances, as illegal and contrary to the terms of his mortgage. It was held that, inasmuch as there was an express pledge of the lands to him, and a proviso that any sale or mortgage of them prior to the payment of his debt should be invalid, the mortgagee's having already obtained a decree for money, without any

allusion being made to the sale of this particular property in execution, did not effect his lien, and that he was still entitled to bring the mortgaged lands to sale free from any subsequent incumbrances(*a*).

The course to be pursued by the mortgagee is the same whether the mortgaged property remains in the hands of the mortgagor, or has passed to a purchaser from him. And a party suing for a debt secured by simple mortgage, and to have the pledged property sold in satisfaction of it, need not include in his suit, any claim to set aside alienations of a date subsequent to that of his own mortgage, as the liabilities of the land are not affected by after-transfers, nor is the validity of such transfers in any way affected by the result of the mortgagee's suit(*b*).

A obtained a decree on a simple mortgage bond. B also obtained a decree on a similar bond, and sold the lands in execution. But B's mortgage was subsequent to A's. It was held that A's rights were not prejudiced by the sale, and that he was entitled to have the property re-sold in execution of his decrees,—free from all subsequent incumbrances. And the fact of A's not having taken out process of attachment against the lands, or given any intimation of his mortgage at the time of B's sale, did not injure A's right(*c*).

Land in the hands of a purchaser, will be sold just as if it still belonged to the mortgagor: but if the names of the purchasers have been registered in the Collector's office, the

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(*a*) N. W. P. v. 8, p. 316. (*b*) *Supra*, p. 105. (*c*) N. W. P. v. 10, p. 680.

property when brought to sale in pursuance of a decree obtained by the mortgagee, is rightly designated in the auction advertisement, as the "rights and interests" of the persons whose names stand recorded, these being in fact the subject of the sale in such a case(*a*).

But there is a summary case, the decision in which seems opposed to this in principle. A mortgagee, who had obtained a decree, applied for an order to have the mortgaged lands sold in execution. He was opposed by certain persons who had not been made parties to his suit, and who were in possession under a decree of foreclosure of the Supreme Court. It was decided on appeal, that no sale could be ordered under the circumstances(*b*).

There does not seem to be any objection to a mortgagee becoming himself the purchaser of the land, for the sale of which he has obtained an order, so long as no case of fraud or collusion is made out against him(*c*). In England, this is not so: there, a mortgagee can become the purchaser, only by special leave of the Court(*d*).

II. In the case of mortgage by bye-bil-wufa, kut kubala, or conditional sale, foreclosure cannot be obtained until certain forms prescribed by law have been gone through; and these forms must be very strictly complied with, any failure in this respect proving fatal to the whole proceeding.

(*a*) N. W. P. v. 7, p. 138.

(*b*) Sum. Cases S. D. A. Bholanath Coondoo, petitioner; 29th January, 1853.

(*c*) N. W. P. v. 6, p. 218.

(*d*) Daniel's Chanc. Practice, p. 1196.

The first thing(a) to be done by a mortgagee by conditional sale wishing to foreclose, that is to say, to have the sale to him declared absolute, is to demand payment of what is due on the mortgage, from the borrower or his representative. If the application is unsuccessful, he must present, by himself or by one of the authorised vakeels of the Court, a written petition to the judge of the zillah or city in which the mortgaged property is situated, stating that the petitioner is mortgagee by conditional sale of the property in question, that a certain sum is due to him for principal, with a sum for interest and costs, that the petitioner has made demands for payment but without effect,—and that therefore he wishes to have his sale made absolute, to be put in possession, and to be registered as proprietor.

On receiving this petition, the judge will cause the mortgagor or his legal representative, to be furnished as soon as may be, with a copy of it, and also with a notice or perwannah under his seal and official signature, notifying to him, that if he does not redeem the property mentioned in the petition, within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale be made absolute.

The judge will act upon the petition of one who professes to be the mortgagee of property within his jurisdiction, without making any inquiry as to the truth of its contents, or even as to the existence of a mortgage at all. And the production of the original deed of mortgage, prior to the issue

(a) Reg. XVII. 1806, Sec. 8.

of notice of foreclosure, is not necessary(*a*). But a judge may if he pleases satisfy himself, by requiring the production of the document, that the applicant for foreclosure is the "receiver or holder of a deed of mortgage"(*b*).

A copy of the mortgagee's application to foreclose, must accompany the notice issued by the judge to the mortgagor or his representative; but it is not required, that he should be served with a copy of the mortgage agreement(*c*).

The notice from the judge to the mortgagor must issue from the court of the zillah or city in which the pledged property is situated at the time of issue: and if this rule is not attended to, all the subsequent proceedings will be bad(*d*).

But it appears that when the lands lie in several zillahs, a notice applicable to the whole lands, but issued from only one of the courts which have jurisdiction, is sufficient; and it is not necessary either that a separate notice should issue from each one of the courts, or that leave should be obtained from the Sudder Court to issue one notice which may suffice for all the property in dispute.

This was decided by the Privy Council in the case of Rasmunee Dabee *v.* Pran Kishen Dass(*e*). In that case, the mortgage deed on which the suit was founded, described the whole lands as situated in zillah Moorshedabad, and out of the court of that zillah notice of foreclosure was issued. The

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(*a*) Rep. Sum. Cases, 8 Sept. 1840. (*b*) Cir. Or., 5th June 1848, No. 46.

(*c*) Cons. 630, 11th March 1831.

(*d*) S. D. A. 1847, p. 485; Reg. XVII. 1806, Sec. 8.

(*e*) Moore's Ind. Ap. Cases, v. 4, p. 392.

Collector was a party to the suit, and objected that part of the lands being in zillah Beerbhoom, the notice was incomplete: on which the mortgagee pleaded an order, of date subsequent to the notice, obtained by him from the Sudder Court, for the trial of the cause in the court of Moorshedabad. Upon these facts, the Privy Council in giving judgment remark: "What is there to show in the whole course of these proceedings, that these lands were not situated partly in one, and partly in the other district; and what is there to show in the course of the proceedings, that if that were the case, an order (*i. e.* notice of foreclosure) made in the court of either district, would not be a proper order. We think that there is nothing in this case, to show that the order was not made in a proper court."

Judges are required to pay particular attention to prevent any unnecessary delay in issuing these notifications; and in justice to mortgagees, as well as in conformity with the Regulations, they should be issued as soon as possible after the receipt of the application for foreclosure. The mortgagee therefore, on filing his application, should be directed immediately to deposit the *tulubanah* of the peon, through whom the notice is to be issued to the other party, that the order for issuing the same may be passed without delay. The order for issuing the notice must be passed, after the deposit of the *tulubanah* of the peon, by whom it is to be served(*a*).

The period of one year, during which the mortgagor may

(*a*) C. O., 9th April 1817, para. 8; Cons. 644, 24th June 1831; N. W. P. v. 7, p. 60.

redeem, must be calculated from the date of the notice(*a*). And the notice is to bear date on the day on which it is actually issued, and not on the day on which the order for its issue is passed(*b*). To this rule, that the year during which the mortgagor may redeem, is to be calculated from the date of issue of the notice, there is no exception; and no local custom can prevail against it(*c*).

It must be particularly observed, that the year allowed by law counts from the date of issue of the notice, not from the date of *service* on the mortgagor. Thus, the date of issue being the 28th May 1841, and the date of service the 17th June, the year counted from the 28th May. The Court in its judgment in this case, said,—"The one year's grace allowed by law to the borrower, after the period mentioned in his engagement has expired, being clearly a matter of favor, there can be no reason for allowing any further indulgence, and the enactment must be construed strictly and to the letter"(*d*). So that it would seem, that if the notice of foreclosure is not *served* on the mortgagor until the last day of the year of grace, he will have no time at all left him for redemption.

From the last case it also appears, that the date of original issue, and not the date of any second or later issue,—as by the Sheriff, to whom the serving of the notice was entrusted,—is the period from which the year is to be calculated.

(*a*) Reg. XVII. 1806, Sec. 8; Cons. 263, 23rd June 1817.

(*b*) Cir. Or., 9th April 1817, para. 2; Sel. Rep., v. 6, p. 166.

(*c*) Sel. Rep., v. 6, p. 166; S. D. A. 1847, p. 270.

(*d*) Sel. Rep., v. 7, p. 264.

Notice is to be given to the mortgagor or "his legal representative." These words are very strictly construed by both the Courts, and great care must be taken that all the proper parties have had notice.

Notice to the person who on the face of the deed appears to be the mortgagor, or to his representative, appears to be all that under any circumstances is required.

When A mortgaged land, B witnessing the deed, but being in reality a co-mortgagor with A, it was held, that notice to A was sufficient, although the petition and plaint of the mortgagees, showed they were cognisant of the fact that B also was in truth a mortgagor(*a*).

So it would seem, that A having mortgaged lands in the name of his son B, notice to B would be considered sufficient: and that this notice, having been served during A's life-time, would be binding upon the other parties who along with B, had on A's death during the year of grace, become his "legal representatives"(*b*).

From this last decision it also appears, that if notice is once given according to the requisitions of the law, a change during the year of grace, in the parties entitled to redeem, does not make any further notice necessary.

It has for some time been the rule that a purchaser at a public sale, of the mortgagor's rights, is the mortgagor's "representative," so as to be entitled to notice: but it is only recently that it can be said to have been finally settled that a purchaser by private sale is so also.

(*a*) S. D. A. 1849, p. 36. (*b*) S. D. A. 1852, p. 423.

When the mortgagor had sold his interest by private sale, and the purchaser was in possession, it was held that notice to the mortgagor was sufficient, without notice to the purchaser(*a*). And guided apparently by this decision, the Agra Court held more lately, that a purchaser by private transfer from the mortgagor is not entitled to notice, and that a mortgagor has no power to constitute a private purchaser his legal representative in a mortgage contract, as the mortgagee's engagement is with the mortgagor, and with him alone. But the Court at the same time decided, that a purchaser who comes in under a title derived from a public sale, is on a different footing, and is as much the "legal representative" of the mortgagor, as the natural heir; that notice must be served upon him; and that no analogy exists between a private sale and a compulsory transfer, carrying with it *primâ facie* a valid title at law(*b*).

The Calcutta Court however has expressed its dissent from the doctrine laid down in these two cases, and declared that the purchaser *out and out* of a mortgagor's title, whether by public or by private sale, is his legal representative, and must be served with notice(*c*).

After much argument it has been ruled, that the procedure of the Company's Courts does not require or admit of the issue of a notice of foreclosure to a second or other subsequent mortgagee(*d*). And when a second or later

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(*a*) S. D. A. 1847, p. 499. (*b*) N. W. P. v. 6, p. 210, v. 9, p. 1: *and see* v. 9, pp. 371, 421: *also* S. D. A. 1854, p. 1. (*c*) S. D. A. 1858, p. 859.
(*d*) S. D. A. 1858, p. 859; N. W. P. v. 8, p. 304; *Supra*, pp. 120-124.

mortgagee intends to foreclose, it is sufficient if he gives notice to the mortgagor or his legal representative, without serving or giving any intimation to a prior mortgagee, even although such prior mortgagee is in possession(*a*). The soundness of these decisions may however perhaps be questioned(*b*).

When the mortgagor's representative was a minor, and notice was served on certain persons, who were believed to be, but who were not in fact, his guardians, the notice was bad(*c*).

A mortgagor by deed directed that his widow should possess his zemindary (half of which was under mortgage), and enjoy it during her life-time: he granted permission to her to adopt a son, and directed that on her death, such adopted son should inherit all his property; and he desired her to pay off his mortgage debts, by selling or mortgaging any portion of his zemindary. Under this authority, the widow did adopt a boy as son to her deceased husband. The adopted son was a minor, and under the guardianship of the widow. Service of notice of foreclosure on the widow, was held to be sufficient without notice to the son(*d*).

When the estate is under the control of the Court of Wards, by which a guardian and manager is put in possession, notice ought to be served on such guardian and manager; and the Collector of the district, as representing the

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(*a*) *See* S. D. A. 1847, p. 499; N. W. P. v. 8, p. 304.
(*b*) *See Supra*, pp. 120—124. (*c*) N. W. P. v. 6, p. 278.
(*d*) Moore's Ind. Ap. Cases, v. 4, p. 392.

Court of Wards, should be a party to the proceedings. If a new manager or guardian is appointed after issuing the notice, he is substituted in all future proceedings, for the original one(a).

It is very doubtful what the exact nature of the "notice of foreclosure" is: that is to say, whether it is a notice which requires to be served upon every person who has the right of redemption, or whether it is a mere proclamation which, even although the right of redemption may be vested in more than one class of persons, need be served only upon the mortgagor or the person or class of persons (hitherto undefined) coming under the head of the mortgagor's "legal representative." The intention apparent from the Regulations is that all those who have the right of redeeming should be served,—the question as to who those are, being left open(b). The tendency of many of the decisions of the Courts, however, has been to treat it as a mere proclamation.

It has been decided that personal service on the mortgagor of the notice of foreclosure, is not absolutely necessary, if due efforts have been made to serve him, but have proved ineffectual.

This has been recently ruled by the Calcutta Court, in a case in which the following judgment was delivered: "We are of opinion that, neither by the terms of the law itself, nor by constructions put upon it by the Court, is it imperative that personal notice should be served on the mortgagor.

(a) Moore's Ind. Ap. Cases, v. 4, p. 392. (b) *See Supra*, pp. 120—124.

The words of the law are, that the judge shall cause the mortgagor or his legal representative, to be furnished as soon as possible, with a copy of the mortgagee's petition for foreclosure, and shall notify to him by a perwannah, that if he shall not redeem the property in the manner provided for by Sec. 7, within one year from the date of the notification, the mortgage will be finally foreclosed. There is nothing in the above terms which prescribes, or even alludes to the necessity of personal service upon the mortgagor; all that is required is, that he shall be made aware, through the Court, that an application of foreclosure has been made, and a year's grace is given him to fulfill his contract with the mortgagee. The Circular Order No. 7, dated 9th April 1817, points out that the year allowed for redemption must be calculated from the date *of issue of notification.* Here nothing is said of personal service; the year of grace is to commence from a date at which the notice had not, and could not have been served on the mortgagor. The notice was not yet issued, but the foreclosure is to be held to have been completed on the expiration of twelve months from the date of the notification. The several Regulations which lay down the mode of serving notice on defendants, namely, Sec. 11, Reg. IV. of 1793, Cls. 2 and 3, and Sec. 3, Reg. II. of 1806, clearly show that, where personal service is not practicable, issue of proclamation for the defendant's attendance is prescribed, and the case goes on *ex parte*; also, by Sec. 6, Reg. II. of 1819, in cases of resumption, and also in execution of decree, by Sec. 15, Reg. XXVI. of 1814, and by

Sec. 7, Reg. VII. of 1825, where, if personal service is impracticable, notice is to be affixed to the defendant's house. To us, it appears that personal service must of course be held to be good; failing that, notice by any other means to the mortgagor is equally good, without actual service on him. The duty of the Court is to serve notice, or to use its best endeavors to give information to the mortgagor of the foreclosure. If upon duly certified returns to the Court, by the serving officer, it should be proved that every attempt to serve or give notice was unsuccessful, the mortgagee is entitled to bring his action for possession after the lapse of the year of grace, calculated from the date of the issue of the notification through the officers of the Court"(a).

And so, in the Agra Court. A decree for foreclosure was passed against several mortgagors; three of them, A, B and C, appealed on the ground that they were not duly served with the notice. The Court in giving judgment, confirming the decree of the lower Court, said: "On referring to the summary proceedings under Sec. 8, Reg. XVII. of 1806, relative to the foreclosure of the mortgage, the Court observe that the appellants A and B, made appearance in the Judge's Court, and opposed the application of the mortgagee for foreclosure. The appellant C, it is true, did not appear on this occasion; but it is stated by the judge, to have been proved by the witnesses produced by the respondent, that the proclamation issued in consequence of this appellant C having

(a) S. D. A. 1854, p. 281. So, 1855, p. 8.

evaded service of the original notice, was affixed at his residence in his presence. Under these circumstances, the Court are of opinion, that none of these three appellants are in a position to plead ignorance of the notice of foreclosure. The mortgagee did all that was possible to be done: no less than twelve separate proclamations were affixed at the residence of such of the mortgagors as had evaded receipt or acknowledgment of the original notice, and the Court are of opinion, that the requirements of the law have been substantially fulfilled as regards these three appellants"(*a*).

A case was remanded to the zillah judge, because he had not given a sufficiently full and explicit opinion on the plea of the defendant, that the notice had not been duly served, having only been stuck up on the door of his (the defendant's) house(*b*).

In one instance, in which the notice was returned with a report that the parties named in it could not be found, upon which a proclamation was affixed at the judge's cutcherry, and the residence of the parties,—this was reckoned to be insufficient; and it was said that the strict letter of the Regulation must be followed, and that the Regulation did not provide for the substitution of a proclamation, in such a case(*c*). Apparently, however, it was not proved that any very great effort had been made to serve the mortgagor personally: at any rate, this case is overruled by the later decisions cited above.

(*a*) N. W. P. v. 8, p. 400. (*b*) S. D. A. 1852, p. 557. (*c*) N. W. P. v. 6, p. 278.

Nine out of eleven sharers made a mortgage of the whole joint property. The remaining two afterwards gave their consent in writing to the mortgage. Notice of foreclosure was served on the *nine* only. But it was held that this was under the circumstances, sufficient notice on *all* the eleven(*a*).

The mere fact of cognizance on the part of the mortgagor, or his representative, that his property is liable to foreclosure, or cognizance of the steps which the mortgagee has been taking, will not absolve the mortgagee from the necessity of strict compliance with the requisitions of the law as to issuing and serving the notice of the application to foreclose(*b*). The Calcutta Court in one case seemed to lay considerable weight on the mortgagor's being aware of what was going on: but the point was discussed merely as incidental to other questions which arose in the cause(*c*).

From these cases it appears, that if the mortgagor or his representative cannot be found and is really *boná fide* absent, and ignorant of the issue of the notice, foreclosure can be completed in his absence, and without his being in the least aware of the proceedings which are being taken against him, if the mortgagee has done all that could be done to effect service. This, in fact, is merely carrying out fully the rule, that the year of grace counts from the *issue* of the notice, not from its *service* on the mortgagor.

The notice to redeem, gives no efficacy to transactions not in themselves legal; and the non-appearance of the mortgagor

(*a*) S. D. A. 1854, p. 511. (*b*) N. W. P. v. 6, pp. 210, 278. (*c*) S. D. A. 1847, p. 499.

within the prescribed year, does not bar him from disputing the contract, or from proving it to be void or voidable(*a*). The mortgagee must establish his case like any other plaintiff.

Notice under Sec. 8, Reg. XVII. 1806 being issuable on application, without any sort of inquiry into the merits of the case, and without any intimation being given to the supposed mortgagor of the intention to make such application, no publicity can be considered to attach to its issue. It is altogether a matter between the mortgagor and mortgagee, and may be just as secret as the original transaction on which it is alleged to be founded. And the fact of a man's having caused notice of foreclosure to be issued, is not in any way to be taken even *primâ facie* as affording a presumption of his good faith. Therefore the Court reversed the decision of a zillah judge by whom a conditional sale, alleged by the supposed seller to be collusive and fraudulent, was held good because amongst other reasons, " had there been collusion, they would not have entered into a deed of conditional sale, which they knew would have to come before the Court, under Reg. XVII., which publicity might have been avoided"(*b*).

Notice of foreclosure having been issued, the mortgagor or his representative, must take care, within the year of grace, to tender to the mortgagee, or to deposit in Court (which is always the safer plan), the whole amount of principal and

(*a*) Sel. Rep. v. 5, p. 81; S. D. A. 1851, pp. 211, 648; Cons. 1140, W. C. 2nd,-Cal. C. 23rd March 1838.

(*b*) S. D. A. 1848, p. 36.

interest, or if the mortgagee has had the usufruct of the land, the amount of the principal only, which is due.

It has been already shown, that the tender must be made in money, but that if the mode of re-payment agreed on in the original contract is more favorable to the mortgagor than that provided by the Regulations, a tender made according to the contract is sufficient(*a*). But whatever stipulations to the contrary have been made, a tender or deposit in strict compliance with the terms of the Regulations, is all that is necessary. At least it was so decided in one instance, where the mortgagee having been in possession, a deposit of the principal was held sufficient to prevent foreclosure, although the mortgage deed contained a covenant, that the mortgage should be foreclosed, unless certain sums due for improvements, as well as the principal sum lent, were paid off within the year of grace(*b*).

Where it had been agreed between the parties, that a sum due from the mortgagee should be set off against so much of the mortgage debt, a deposit by the mortgagor of what remained due from him, after making the deduction, was held to be sufficient. But a mortgagor who makes a tender of this sort runs a very great risk, and ought to be very sure of his ground before he does so. For if the sum tendered or deposited falls short, though it be only to the extent of one rupee, of the amount due, the mortgagor's right is, on the expiry

(*a*) *Supra*, pp. 118, 119; Reg. XXXIV. of 1803, Sec. 14.

(*b*) N. W. P. v. 8, p. 161.

of the year of grace, wholly gone.) In giving judgment in one case(*a*), it was remarked by the Court, "that although the legislative provisions for the redemption of mortgages, are specially framed with a view to the protection of mortgagors, the obligation imposed by them of meeting the call for the discharge of the mortgage debt within the period fixed, is strict and positive, and if the mortgagors fail to make the payment demanded, they must do so at their peril, since, should it prove 'that the alleged sale was authentic and valid, and that *any* part of the amount demanded was *due*', the sale will have become absolute, and he must, on a suit being brought against him, lose his lands(*b*). The law makes no allowance for errors on the part of the mortgagor. The line must be drawn somewhere, and the difference of *one* rupee in the sum tendered is as fatal to the redemption, as of 10,000. The same strictness is observed in the parallel cases of the laws of limitation, and of appeal: it may seem hard that a difference of one day only should bar the suitor or appellant's entrance to the Court, but so the law has decreed, and it is the duty of judicial officers, in this, as in other cases, to conform to its provisions."

The tender or deposit must be made, within a year from the date of the issue of the notice of foreclosure(*c*). But if the last day of the year of grace happens to be a holiday at the public offices, a deposit on the first ensuing business day will generally be held sufficient.

(*a*) N. W. P. v. 8, p. 447; v. 10, p. 580.

(*b*) Cir. Ord. 22nd July, 1813.

(*c*) N. W. P. v. 10, p. 580.

It has been ruled that the year of grace having expired on Sunday, a deposit or tender on the following day is good(*a*). And the year of grace having expired during the Dusserah vacation, a deposit made on the day on which the Court re-opened, was sufficient, and saved the estate from foreclosure(*b*).

But the later cases seem to show, that if the Courts are shut on the day that the year expires, the mortgage money ought to be privately tendered within the prescribed time, in order to entitle the mortgagor to make a valid deposit on the first ensuing Court day. It has been declared by both the Calcutta and the Agra Courts, that when the last day of grace happened to be a holiday at the public offices, this might afford a sufficient excuse for not having paid the money into Court, but was no reason why there should not have been a private tender(*c*). There can therefore be no doubt that, in order to be certain of saving the right of redemption in all such cases, a private tender within the year ought to be made.

When a sum of money is brought for the purpose of being deposited in Court, it ought to be received whatever its amount, and its receipt should be notified to the mortgagee. It is irregular for the Court officer to make a report as to the insufficiency of the tender, and the correct amount required(*d*).

(*a*) Rep. Sum. Cases, 15th July, 1841. (*b*) Sevestre's Rep., 27th April, 1840.
(*c*) Sel. Rep. v. 7, p. 261; N. W. P. v. 7, p. 60.
(*d*) N. W. P. v. 10, p. 580.

The tender or deposit must be made unconditionally, and if it is fettered with any restrictions, it is bad, and the mortgage will be foreclosed on the expiration of the year of grace, just as if no tender or deposit had been made.

The mortgagors some weeks before the expiry of the year of grace, applied for leave to deposit the money in Court, subject to a condition, that it should not be paid to the mortgagee, but should be kept in Court, until a regular suit disputing his claims could be brought; the judge gave the permission asked for, and received the money so conditionally deposited. The day after the year of grace came to an end, the judge called upon the mortgagors to take away their money, remarking that such a conditional deposit was not allowable; and he afterwards declared the conditional sale to have become absolute, because the money had not been paid or deposited within the year. On appeal, the majority of the Court expressed themselves thus: "We are of opinion, that the judge when applied to to receive the money, though coupled with certain conditions, did not act contrary to any law or practice in receiving the money. He complied with the mortgagors' request; but this did not remove from the mortgagors the responsibility of the consequences of their own act. The judge acts in such cases purely ministerially; it is not his place to indicate to any one the course he is to pursue; and any thing that he may do in compliance with such a request as that of the mortgagors, in this case, does not in any way affect the relation existing between the mortgagors and the mortgagee. The deposit was made with a

request that it might not be paid to the mortgagee: this is not a tender or payment contemplated by Sec. 7, Reg. XVII. of 1806, and Sec. 2, Reg. I. of 1798, and had the judge never passed his second order (desiring the mortgagors to take away the money), the right of the mortgagors was gone the preceding day: and any order passed after that date, must be considered as a nullity as far as the merits of this case are concerned. We are therefore of opinion, that the acts of the judge form no bar to the foreclosure of the mortgage." The dissentient judge, after expressing his opinion that the judge of the lower court had acted judicially, and not merely ministerially, remarks: "It is clear to me, that deluded by the judge's first order (allowing them to make the deposit conditionally), the mortgagors have lost their property; and this is a case in which the strictness of the law should yield to the unquestionable equity of the mortgagors' claims"(a).

So, when the mortgagor restrained the payment to the mortgagee of money deposited, until the result of a redemption suit which he was about to bring, should be seen, and the year of grace expired without any unconditional deposit being made, and the redemption suit failed, the mortgage was declared foreclosed as if there had been no deposit(b).

A mortgagee demanded a larger sum than was really due to him. The mortgagor paid into Court the sum he asked for, stating that he did so merely to obviate all objections, and

(a) S. D. A. 1847, p. 462. (b) S. D. A. 1848, p. 897.

not as admitting it to be due. The mortgagee having taken it all out of Court, the mortgagor sued for and recovered what he had taken in excess of that to which he was entitled(*a*).

The tender or deposit ought to be made in one sum, not by instalments; at least, it is to the mortgagor's advantage to pay in one sum, as his position is in no way benefited by the payment of any thing less than the whole amount due: and if he chooses to make several deposits on different dates, he will not be allowed interest on any of them, except from the date on which the demand was discharged in full, and due notice given to the mortgagee. The mortgagee is not obliged to receive sums deposited on account, until the whole is paid in; he defeats his own claim by accepting them, as his taking out of Court a sum paid in by the mortgagor, is an acknowledgment that such sum is in full discharge of all monies due in respect of the mortgage debt(*b*).

If the mortgagor admits the claim of the mortgagee, and has not the means of paying what is due to him, he may put him in possession of the property, and without waiting till the end of the prescribed year, present a petition to the Court from which the notice issued, stating his inability to pay, and that he has made over possession to the mortgagee. And such a proceeding, if possession is actually given to the mortgagee, has apparently the same effect as a decree for possession, on foreclosure, made in a regular suit. It has, however, been doubted whether a *bonâ fide* purchaser, who had purchased

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(*a*) S. D. A. 1855, p. 54. (*b*) N. W. P. v. 7, p. 60.

from the mortgagor before the presentation of the petition, might not, notwithstanding, redeem at any time during the year of grace. And if possession is not delivered over to the mortgagee, the mortgagor's having filed such a petition, will not bar the right of any one, who under ordinary circumstances would have been entitled to redeem, except that the mortgagor himself would probably be held to be bound by his own act, and to be foreclosed(*a*).

In like manner, the mortgagor, without any proceedings whatever being taken in Court, may convey absolutely to the mortgagee, the property already conveyed to him conditionally. But in such a case, the mortgagee must be careful to obtain sufficient proof of his sale having been made absolute: and he ought to have his name at once registered in the Collector's books as proprietor, and should not allow it to remain there as mortgagee(*b*).

It is not, however, absolutely necessary that there should be any written agreement, in order to convert a conditional into an absolute sale, even though the conditional sale itself was in writing: any thing which proves that the mortgagor has agreed to the sale being made absolute, is sufficient. A suit was brought for possession of land which had at first been conditionally sold to the plaintiff, but which, it was alleged, had been afterwards absolutely conveyed to him. The plaintiff did not prove any positive contract making the sale absolute, but he produced from his own custody, the

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(*a*) S. D. A. 1849, p. 311. (*b*) N. W. P. v. 8, p. 273.

ikrars given by him to the defendant, declaring the sale to be only conditional, and gave evidence to the effect that these had had been delivered up to him by the defendant, on the payment to him of a further sum of money. It was decided, that the return of these ikrars afforded conclusive evidence of an unconditional sale, and that, therefore, the plaintiff must have his decree(*a*).

But a mortgagee ought either to insist upon having a regular decree of Court, declaring the mortgage foreclosed, which undoubtedly gives him by far the safest title, or, if he chooses to have his sale made absolute without going into Court, he should see that the conveyance to him is made by a deed properly executed and attested, which he may be able to prove satisfactorily in any Court of law. And a mortgagee who believes that his conditional purchase has been made absolute, runs a very great risk of being unable to establish that fact, if he can produce no better proof than that which was the ground of the decision in the case last referred to.

A plaintiff sued to have his name registered in the collectorate as proprietor of certain lands, alleging that he was in possession, the property having first been leased to him, and before the lease expired mortgaged to him, and the mortgage having been foreclosed. The judge nonsuited the case, because the plaintiff "had not obtained possession of the foreclosure in virtue of his mortgage," and because "he was bound to sue for possession under the mortgage before he

(*a*) Sel. Rep. v. 7, p. 181.

could prefer a claim for mutation of names." The Sudder Court decided that "as the plaintiff was in possession, and his suit for mutation of names brought into issue every point that could have required investigation in a suit for possession under the mortgage," the judge should have tried the case on the merits. And it was accordingly remanded to him for re-trial(*a*).

If the mortgagor, or his representative, makes a tender or deposit within the year of grace, it remains for the mortgagee to consider, whether or not he will accept of the sum so tendered or deposited. He will accept of it only if it covers the whole of his demand, as he cannot take it out in part payment, and continue his suit for foreclosure, or for payment of what remains due.

If the mortgagee is ready to receive the sum deposited, the judge in whose Court it has been placed will immediately pay it over to him; if he refuses to receive it, the judge will restore it to the person who deposited it. The mortgagor who has tendered or deposited a sufficient sum, or a sum which is accepted as sufficient by the mortgagee, being in exactly the same position as one who has come forward to redeem, and made a deposit or tender for that purpose under Reg. I. of 1798, Sec. 2, is entitled to possession summarily without suit(*b*). And the mortgagee, on applying to take the money out of Court, must surrender the mortgage deed, or show satisfactory cause for his not doing so(*c*).

(*a*) S. D. A. 1856, p. 8. (*b*) Cir. Ord., 22nd July, 1813.
(*c*) *See* Sel. Rep. v. 7, p. 260; *Supra*, p. 149.

Up to this point, the functions of the judge, in proceedings taken for foreclosure, are purely ministerial, he having merely, without instituting any inquiries into the merits of the case, or expressing any opinion as to them, to issue on the application of the parties, certain fixed notices and orders,— to receive, and pay over to the mortgagee if desirous of taking it, whatever amount may be paid into Court by the mortgagor, or if the mortgagee should refuse to accept the same, to restore it to the mortgagor,—and to receive proof of service of the several notices. And it is the duty of the judge stricly to confine himself to recording simply the facts which have occurred during the summary process, and to abstain from expressing any judicial opinion whatever on the proceedings. All questions as to their effect, or as to the legality or validity of the alleged mortgage, or even as to the existence of a mortgage at all, must be left undecided at this stage, and form the subject of a regular suit to be subsequently instituted(*a*).

After the lapse of the year of grace, in the event of the proper sum, or such a sum as is accepted by the mortgagee, not being deposited or tendered, the mortgagee who wishes to complete the foreclosure must institute a regular suit to have the conditional sale declared absolute, or, if he has not had the usufruct, for possession of the mortgaged land, as on a conditional sale become absolute. And he must not sue merely for possession as mortgagee, but

(*a*) Cir. Ord., 22nd July, 1813; 17th January, 1834.

for possession as absolute proprietor by reason of foreclosure having taken place(a).

To succeed in his suit, the mortgagee must prove that all the legal formalities have been observed, that notice was issued from the proper Court, that it was duly served on the right parties, that the period of a year from the issue of it has elapsed, and that no sufficient tender or deposit was ever made before the expiration of the year of grace. Without proving all these points he cannot obtain a decree, whether the defendant pleads that there has been any irregularity or not, and even if the case is tried *ex parte*. The Court is not justified in overlooking any error in the summary proceedings, although its attention is not called to it by the parties most interested(b).

So also the mortgagee must establish, that on the merits of the case, he is entitled to what he claims: for, as has been seen above, the mere issue of notice, and the proceedings in connection therewith, give no sort of validity to his claim, and if he cannot show a good title as mortgagee, his suit must be dismissed(c).

The mortgagor's not coming forward in Court, or taking any steps to protect himself during the year of grace, does not in any degree debar him from appearing in the mortgagee's suit for possession, and raising any plea on the facts and merits of the case: and the judge is bound to investigate and

(a) N. W. P. v. 9, p. 234.

(b) Sel. Rep. v. 5, p. 346; S. D. A. 1847, p. 485; 1853, p. 221.

(c) *Supra*, p. 200; Sel. Rep. v. 5, p. 81; S. D. A. 1851, p. 648.

decide the case on its merits, notwithstanding that no objections to the conditional sale are preferred till more than a year after the date of issue of notice of foreclosure(a).

But any defence which the mortgagor sets up, must be one which existed prior to the expiry of the year of grace,—the one great question in all foreclosure suits being whether the mortgagee was on that date entitled to foreclose or not. With that year ends the mortgagor's whole interest in his property, unless he can prove, that previous to its lapse, he was entitled to have it declared by the Court, that the mortgage had been redeemed.

If the mortgagor takes no steps to redeem within the year, from the knowledge that the debt has been fully paid, and that therefore the mortgage cannot be foreclosed, he must nevertheless appear and defend a suit brought by the mortgagee to have the sale declared absolute and to obtain possession. If he does not do so, and a decree is made against him, it will be binding on him until he brings a fresh suit and has it set aside.

In all instances where the contract was made before the passing of Act XXVIII. of 1855, the lender on a mortgage by conditional sale, who has been in possession and in the enjoyment of the usufruct of the land, must account to the borrower for the proceeds of the estate, whilst in his possession. But this rule does not apply to the mortgagee's possession after the lapse of the year of grace, if the notice issued is followed,

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(a) S. D. A. 1848, p. 6; 1851, pp. 211, 648.

within twelve years from the time when the mortgagee could first have sued, by a suit for foreclosure(*a*).

Therefore in such cases, in a suit by a mortgagee to render absolute a conditional sale, the mortgagor may plead, that prior to the expiry of the year of grace, the amount borrowed, together with legal or the stipulated interest, had been realised by the mortgagee from the usufruct of the property; and on this plea, before it can be ruled that his equity of redemption is barred, he is entitled to have an account from the mortgagee,—and this, even although he fails to produce evidence in support of his plea. But this defence will be of no avail, unless, on the taking of the accounts, it appears that the whole sum due (including both principal and interest) had been realised before the close of the year allowed by law for redemption(*b*).

A mortgagee, who enters into a compromise with his debtor, and acknowledges in Court that he is satisfied, and renounces his right to foreclose, cannot afterwards change his mind, and sue for foreclosure.

During the progress of a foreclosure suit, the mortgagee made a compromise with the mortgagor, and filed a soolenamah, renouncing all further claim to possession; he afterwards brought a fresh suit for foreclosure, on the ground of non-performance of the terms of the compromise, but it was dismissed by the Court, without any inquiry into the merits.

(*a*) Reg. I. 1798, Sec. 3.

(*b*) S. D. A. 1848, pp. 311, 711; 1851, p. 211. *See* N. W. P. v. 9, p. 371.

In such a case, there is no remedy for the mortgageo, except by an action for damages for breach of contract(*a*).

And so, a decree for foreclosure cannot be set aside, on the ground that the mortgagor allowed the decree to go against him without offering any opposition, in consequence of the mortgagee's having executed a deed, during the year of grace, in which he covenanted to restore the mortgagor to possession on certain conditions, which covenant he had broken(*b*).

But a mortgagee may waive his right to *immediate* possession on certain conditions, and his right to foreclose will revive on breach of these conditions by the mortgagor.(*c*).

A decree of Court declaring a mortgage finally foreclosed, and the mortgagee entitled to possession, puts an end for ever to all right to the land, which the mortgagor may have, or any other person claiming under him, whose title did not originate prior to the date of the mortgage, which has been foreclosed. It must be noted, however, that the Government may at any time cause lands to be sold for arrears of revenuo, into whose hands soever they may have passed.

It is hardly necessary to observe, that care must be taken by the judges, to ascertain the real nature of the mortgage they are dealing with, and that, if the remedies applicable to one species of mortgage, are made use of, when the transaction belongs to another, the whole proceedings will be bad.

(*a*) N. W. P. v. 6, p. 260. (*b*) N. W. P. v. 5, p. 294; *Supra*, p. 130.
(*c*) N. W. P. v. 9, p. 564; v. 11, p. 119.

When possession was given by the lower Court, under the impression that the mortgage agreement was one of conditional sale, and the transaction was afterwards, on appeal, found to have been one of simple mortgage, the transfer of the land made by the Court below was cancelled, and the mortgagees were enjoined to accept a tender of principal and interest which was made by the mortgagor, notwithstanding that more than a year had elapsed from the issue of notice of foreclosure by the mortgagee, as in a case of mortgage by conditional sale(*a*).

So, the Court of appeal, considering the mortgage to be by conditional sale, reversed the decision of the judge and moonsiff, who had respectively held that the transaction was a simple mortgage, and therefore not subject to the rules applicable to conditional sales(*b*).

In a suit for possession on foreclosure, a decree for money cannot be given(*c*). And a suit will not lie by a mortgagee, to foreclose and to recover interest. "Had the mortgagor repaid the money lent, interest would have been payable under the section referred to(*d*), but by foreclosing the mortgage, and obtaining possession of the property, the mortgagee must be considered to have secured all he was entitled to receive in the transaction"(*e*).

The mortgagee having obtained a decree for foreclosure and possession, is entitled to immediate possession of the property; and if he meets with any opposition or delay, he is

(*a*) S. D. A. 1848, p. 194. (*b*) N. W. P. v. 8, p. 370.
(*c*) S. D. A. 1851, p. 648. *See* N. W. P. v. 11, p. 75.
(*d*) Reg. I. of 1798, Sec. 2. (*e*) S. D. A. 1856, p. 388.

entitled to recover all costs and expenses incurred by him in consequence, together with mesne profits or wasilat from the date of his decree. And for these costs and mesne profits, the mortgagor and all those who represent him will be held liable.

When the mortgagor's rights were sold in execution of a decree against him, the purchaser (although he had never actually taken possession himself) and his assignee were, as it appears, made responsible jointly with the mortgagor, for wasilat accrued due between the date of the decree of foreclosure, and the date of the mortgagee's obtaining possession(*a*).

In one case, where the terms of the contract were, that in the event of the mortgagor's making default in payment on a particular day, he would put the mortgagee in possession of certain lands by way of absolute sale, and the mortgagor made default in payment, and also in surrendering his property as agreed,—the mortgagee was allowed to sue for the recovery of the principal sum lent, with interest, and was not restricted to his suit for possession(*b*).

But it would not be so held now: for, although there are certain cases in which the mortgagee will be permitted to depart from the usual practice, and to sue for the recovery of the money lent by him instead of for foreclosure and possession, yet, this can only be when good and sufficient cause is shown for his adopting such a course. And apparently any thing by which, without any blame on his part, it is rendered

(*a*) S. D. A. 1847, p. 479.

(*b*) Sel. Rep. v. 5, p. 10.

impossible for the mortgagee to obtain possession, will alone be considered to be good and sufficient cause(*a*).

Thus the mortgagor having been all along in possession, and having neglected to pay the Government revenue, in consequence of which the land was, after the issue of notice of foreclosure, sold for arrears; the mortgagee was allowed to recover the principal and interest due to him, his lien having been destroyed through no fault of his(*b*). But, as the rights of a mortgagee are in no degree affected by any subsequent transfer of the mortgaged property, except a sale for revenue, a private sale by the mortgagor, or even an auction sale in execution of a decree, and after the issue of notice of foreclosure, will not entitle a mortgagee by conditional sale to sue to recover the debt. His remedy is still against the land alone(*c*). And so, where the mortgagee had obtained a decree for foreclosure and possession, but before he could get possession, the property was advertised and sold in satisfaction of the decree of another judgment creditor(*d*).

One, who for good and sufficient reason sues for the money due, instead of for foreclosure and possession, must not sue merely as on a common money bond, but as for money which he has become entitled to claim, in consequence of the mortgagor's breach of contract. His plaint, in short, must be consistent with the case he intends to prove(*e*).

(*a*) Cons. 898, 5th September 1834; Sel. Rep. v. 7, p. 92.
(*b*) S. D. A. 1848, p. 368.
(*c*) Sel. Rep. v. 7, p. 42; N. W. P. v. 3, p. 209.
(*d*) N. W. P. v. 7, p. 272. (*e*) S. D. A. 1850, p. 44.

It has been said that if a suit is brought for money when it ought to have been for possession, or *vice versâ*, the objection must be specially pleaded by the party who wishes to take advantage of it, and that the Court must not of its own accord take notice of the error(*a*). But if a plaintiff sues for that to which, according to his own showing, he is not legally entitled,—as he does when he brings his action for money, when he has no right to any thing but possession, or for possession, when he can legally recover only money,—it is difficult to see how the Court can do otherwise than nonsuit him, whether the defendant takes the objection or not.

In one instance, a mortgagee sued for and recovered one-half of the sum advanced by him. The mortgagor on receiving the loan executed a deed engaging to make over, or to arrange for making over, certain property in mortgage by conditional sale; but he in fact made over only half of that property. The Court ordered that he should return to the mortgagee a proportional amount of the sum received by him, with interest(*b*).

When mortgage lands are sold for arrears of Government revenue, not accrued through the default of the mortgagee, any proceeds which may arise from the sale, in excess of the arrears, belong to the mortgagee, and he has a right of action for their recovery(*c*). And this is so, whether process of attachment on decree has been taken out prior to the sale of the property or not(*d*).

(*a*) N. W. P. v. 8, pp. 272, 591. (*b*) S. D. A. 1851, p. 750.
(*c*) S. D. A. 1854, p. 182; *See* 1853, p. 87. (*d*) S. D. A. 1855, p. 411.

And if the proceeds in excess of the arrears due in respect of the lands sold, are applied by the Collector in liquidation of arrears due from the mortgagor on *other* lands, the sums so applied may be recovered by the mortgagee, from either the Collector or the mortgagor(*a*).

In a suit for foreclosure, a third party intervened and proved an absolute sale to himself prior to the date of the mortgage. The mortgagee's foreclosure suit was consequently dismissed, and he was ordered to pay the costs of the intervening proprietor. On appeal this order was confirmed, as it was the mortgagee's suit which compelled the third party to come into Court; the mortgagee, however, would be entitled to recover from the mortgagor, all the costs incurred by him in the case, including those of the intervener(*b*).

One who has the right of pre-emption may assert it, either at the time of making the mortgage, or when the conditional sale comes to be made absolute(*c*).

(*a*) S. D. A. 1854, p. 182. (*b*) S. D. A. 1853, p. 574.
(*c*) N. W. P. v. 10, p. 588.

CHAPTER XI.

OF ACCOUNTING.

In every case, not coming under Act XXVIII. of 1855, in which it is not admitted by the mortgagor that the sum alleged by the mortgagee to be due to him is, or at the expiry of one year from the date of the issue of notice of foreclosure was, really so due, the Court must take an account of the principal, interest, and costs due on the mortgage—whether the suit be brought by the mortgagor for redemption, or by the mortgagee for foreclosure. And this rule is of such universal application, that a suit for redemption on the ground of the debt having been liquidated from the usufruct, is not to be dismissed without taking the accounts, although the judge sees that one of the items set out in the mortgagor's statement of the receipts of the mortgagee, and without which the full amount would not, according to the mortgagor's own showing, have been made up, is of an illegal nature, and must necessarily be struck out(*a*).

(*a*) N. W. P. v. 6, p. 319.

The mortgagor is not bound in the first instance to make out a *primâ facie* case, and an admission by him that something may be due does not bar his right to have the accounts taken. The mortgagee must file his accounts before the mortgagor is called upon to prove that the debt has been satisfied: so far, the *onus probandi* does not lie on the mortgagor(*a*).

And it is the duty of the Court, when it dismisses a redemption suit on the ground of the mortgage debt not having been liquidated from the usufruct up to the date of suit, to determine the exact sum then outstanding, by making up a correct account, and disposing of the several objections of the parties in regard to the items composing it, in order that no matter admitting of adjudication in that action, may be left open to future litigation(*b*).

It is the privilege of the mortgagor not to be bound to account for the rents and profits received by him from the land; and there seems to be no exception to this rule, however insufficient the security may be. But if, in breach of an express agreement to the contrary, he remains in possession, to the exclusion of the mortgagee, the latter will have his remedy in a suit for possession and mesne profits.

The mortgagee is subject to an account from the time he is put in possession, and for the whole period that he remains in the character of mortgagee. But he will not be so subject if the mortgage was made after Act XXVIII. of 1855

(*a*) S. D. A. 1855, p. 432; N. W. P. v. 9, p. 371.
(*b*) N. W. P. v. 8, p. 112: v. 9, p. 388.

came into force, and there is an express stipulation that he shall not be called on to account. If the mortgagee during a part of his term, has held under some title other than that as mortgagee, he will not have to answer to the mortgagor for the proceeds accrued during that period. In one case, it happened that neither the mortgagee in possession, nor the mortgagor, chose to pay up certain old balances of revenue which had become due before the making of the mortgage. The Collector having entered on the estate, the mortgagee afterwards came forward and paid the arrears, whereupon the Collector gave him a farm of the land for ten years. These ten years were held to constitute a gap in the mortgage possession, and the mortgagee could not be compelled to render an account of the profits then received by him(*a*).

Where the mortgage deed declared that the mortgage was to have effect from a date prior to that of the deed, it was held that the mortgagee was liable to account for the proceeds from such prior date, but that the mortgagor must be charged with interest from the same date(*b*).

In taking the accounts, interest is, as a general rule, allowed on the payments of both parties ; but there are two modes in either of which the accounts may be made up. They may be permitted to run on, from the date of the loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realised over and above the interest to which the mortgagee is entitled, from

(*a*) N. W. P. v. 7, p. 7. (*b*) N. W. P. v. 10, p. 684.

the date of realisation:—or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal(*a*). The result attained by these methods is the same.

When on the accounts being adjusted, it is found that the mortgagee's claim for principal and interest has been completely satisfied, all subsequent receipts are to be considered to belong to the mortgagor, and he will be entitled to simple interest on them until they are repaid to him(*b*). But although the general practice of the Courts is to allow interest on mesne profits or wasilat, still it will not be given if there has been any improper delay in the institution of the suit for their recovery, or if any special ground exists for withholding it. There is no rule rendering it compulsory on the Courts to decree a specific rate of interest; a discretionary power is vested in them, in reference to the circumstances of each case(*c*). And mere delay is not necessarily *improper* delay(*d*).

Any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal. Thus, if they have agreed that the residue of the sums received from the land, after payment of interest, shall be carried to liquidation

(*a*) S. D. A. 1848, p. 549; 1852, p. 831.
(*b*) S. D. A. 1853, p. 464. *See* as to allowing interest, N. W. P. v. 10, p. 257.
(*c*) N. W. P. v. 8, p. 228; v. 10, p. 8.
(*d*) N. W. P. v. 9, p. 868. *See* S. D. A. 1855, p. 404.

of the principal, and the account closed to the end of each year, the accounts must be taken in this manner(*a*).

As a general rule, in cases to which the usury laws are applicable, where there is no agreement that a less rate shall be taken, the Courts will allow interest at the rate of 12 per cent. per annum. But they are not bound to award 12 per cent.: that is the highest rate which they are permitted to give, and though it is customary, and the general understanding of the country, that 12 per cent. should be awarded on deeds containing no stipulation for a lower rate, still this general custom will be departed from, if the mortgagor can establish any good reason for its being so(*b*).

In cases to which the usury laws are not applicable, the Courts will allow interest at the rate stipulated for, in the contract: or if no rate of interest shall have been stipulated for, and interest be payable under the terms of the contract, at such rate as they shall deem reasonable(*c*).

Any stipulation by which the mortgagee agrees to take interest at a rate lower than 12 per cent. will be binding on him. And where he has consented to take the usufruct of the land in lieu of interest, he cannot claim interest at the legal rate or otherwise, on the ground of the usufruct having fallen short of the legal, or any other rate(*d*).

(*a*) S. D. A. 1848, p. 549. N. W. P. v. 10, p. 22.

(*b*) S. D. A. 1852, p. 748; N. W. P. v. 8, p. 228: v. 9, p. 368: v. 10, pp. 22 684. *See* S. D. A. 1854, p. 518.

(*c*) Act XXVIII of 1855, Sec. 6.

(*d*) N. W. P. v. 7, p. 307; v. 8, p. 178; S. D. A. 1852, p. 678.

A mortgage deed contained a condition that the principal should be repaid in one sum by the mortgagor, and that until it was so paid, the mortgagee should have the usufruct of certain lands, but it did not provide for the payment of any specific rate of interest. The lower Court set aside the condition, and declared that the mortgagor was entitled to demand an account of the profits of the estate: and in making up the accounts, did not allow the mortgagee any interest, "because no mention of that was made in the mortgage deed." It was held by the Court, on appeal, that "the reason why the mortgage deed did not provide for the payment of any specific rate of interest, was the condition which stipulated that the mortgagee should receive the usufruct. The judge having set aside this condition, should have allowed the legal rate of interest in calculating the profits"(*a*).

There was a non-usufructuary mortgage, interest not being expressly stipulated for. The mortgagee was held to be entitled to interest only from the date upon which the loan became re-payable(*b*). And in another case interest was allowed from the date of suit, until realisation of the principal sum decreed(*c*).

It seems almost superfluous to remark that the ordinary rules regarding the allowance of interest, will be followed, even when the parties are both Mussulmans (whose religion and law forbid the taking or giving of interest). The Mahommedan law is not to be acted on in this instance, as

(*a*) N. W. P. v. 3, p. 417. (*b*) S. D. A. 1855, p. 54.
(*c*) N. W. P. v. 10, p. 363.

the suit does not relate to the "inheritance of, or succession to, landed property," in which cases alone the Regulations require that the proceedings should be regulated by the peculiar law of the litigant parties(*a*).

Under Sec. 5, Reg. XXXIV. of 1803(*b*), the Courts are not in any case whatever, except those specified in Sec. 11 (which relates to respondentia loans and policies of insurance), to decree a greater sum for interest than for principal. But this rule of course does not apply to interest accrued due after the institution of the suit(*c*).

Interest above the rate of 12 per cent. per annum is not to be allowed under any circumstances under contracts entered into before Act XXVIII. of 1855, came into force. And compound interest, arising from intermediate adjustments of accounts, is never to be given in such cases. But this rule does not apply where accounts between the parties have been adjusted, and the former bonds or agreements cancelled, and new bonds or agreements taken for the aggregate amount of principal and interest due, consolidated into principal(*d*).

In one case the accounts were prepared on the principle of striking a balance of interest at the close of the year, deducting the principal of all payments by the debtor, from the principal of the debt, and setting off only the interest accruing

(*a*) Reg. V. of 1831, Sec. 6, Cl. 2; S. D. A. 1848, p. 530; N. W. P. v. 7, p. 88.

(*b*) Reg. XV. of 1793, Sec. 6 repealed as well as Reg. XXXIV. of 1803. Sec. 5, by Act XXVIII. of 1855; N. W. P. v. 8, p. 479.

(*c*) Sel. Rep. v. 1, p. 242; v. 3, p. 270; v. 4, p. 261.

(*d*) Reg. XV. of 1793, Secs. 4, 7, 8; Reg. XXXIV. of 1803, Secs. 3, 6; Reg. XVII. of 1806, Sec. 2, (all repealed by Act XXVIII. of 1855): S. D. A. 1852, p. 1021. N. W. P. v. 11, p. 175.

to the debtor on his payments during the year, against the interest becoming due on his principal debt: but the Court held that this mode of accounting was wrong, as no compound interest was allowable, and that the debtor was entitled to have all sums, whether principal or interest, credited to him during the year, applied first to the liquidation of any interest due, and the surplus only, remaining after such liquidation of interest, carried to the reduction of the principal(a).

Under Act XXVIII. of 1855, a contract by which it is agreed that the use or usufruct of any property will be allowed in lieu of interest, shall be binding upon the parties. And upon any mortgage or contract entered into after the passing of that Act interest is to be calculated at the rate stipulated therein, or if no rate of interest has been stipulated for, and interest be payable under the terms of the contract at such rate as the Court shall deem reasonable(b).

The mortgagee is required to deliver accounts of his gross receipts and of his expenditure, and it is a positive duty that he should do so(c). Moreover the accounts rendered must be full and complete, and the judge may not rest contented with a mere rough abstract of the receipts during the time the mortgagee has been in possession(d).

The mortgagee must swear, or if he is a person exempted from taking oaths, must subscribe a solemn declaration, that the accounts delivered are true and correct. And this must

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(a) S. D. A. 1853, p. 464. (b) Act XXVIII. of 1855, Secs. 4, 6.

(c) N. W. P. v. 7, pp. 68, 511; S. D. A. 1856, p. 328; Reg. XV. of 1793, Sec. 11; Reg. XXXIV. of 1803, Sec. 10. (d) N. W. P. v. 5, p. 244.

be done by the mortgagee himself, the oath of his karinda or manager being wholly insufficient, and it being the duty of the judge, who tries the suit, to require the mortgagee to attend his Court in person, and to depose to the truth and authenticity of his accounts(*a*).

But native ladies whose attendance in Courts of Justice is usually dispensed with, are not obliged to appear in Court to swear to the truth of the accounts prepared by their Agents. The oath of the Agent is all that is required in such cases(*b*).

When there are several joint mortgagees, the oath of one or more of them, competent to discharge the duty, is sufficient in regard to the *primâ facie* admission of the accounts. How far such accounts are deserving of credit, is another question(*c*).

In a case in which the oath of the gomastah of the mortgagee was by consent taken in the lower Court as sufficient, the Sudder Court refused to listen to the objection that the mortgagee himself ought to have sworn(*d*).

It appears that when a mortgagee, no longer in possession, sues to recover a balance from the mortgagor, he is not bound to swear to the accounts. These may possibly be no longer in his possession(*e*).

A mortgagee who evades the rendering of the required accounts, or who will not swear or depose to the truth of those rendered, subjects himself to a fine(*f*).

(*a*) Reg. XV. of 1793, Sec. 11; Reg. XXXIV. of 1803, Sec. 10; N. W. P. v. 7. p. 607.

(*b*) N. W. P. v. 9, p. 465.

(*c*) N. W. P. v. 9, p. 465; v. 10, p. 318.

(*d*) N. W. P. v. 10, p. 318.

(*e*) *Ibid.*

(*f*) N. W. P. v. 7. p. 68.

And in such a case, any reasonable proof, even if offered by the mortgagor, may be accepted by the Court. In one instance, a mortgagee in possession had applied to the Collector to have a renewal of the settlement of the estate made in his name, and sent in *doul* papers along with his application, praying to be admitted to engage for the estate at the jumma therein specified; these papers, when produced afterwards by the mortgagor, were held to be sufficient evidence, as against the mortgagee, he having failed to furnish any proper account(*a*). So an account made out by the Ameen on the spot, and from local inquiry, has been held to be a good basis on which to proceed, and to be binding on the mortgagee who had chosen to withhold his accounts(*b*). And the account will be taken on the footing of village papers regularly filed by the mortgagee and not objected to at the time by the mortgagor, unless very good reason is shown for putting these accounts aside and proceeding to a settlement or other and independent data(*c*).

If the mortgagee has not kept accounts, or has kept them badly, the presumption in every thing will be against him(*d*). But if the mortgagee does not file proper accounts, it does not follow that those of the mortgagor are necessarily to be taken as correct without any inquiry(*e*).

The mortgagee having rendered, and sworn to the truth of, his accounts, the Court will permit the mortgagor to examine them, and after hearing his objections, will proceed to take

(*a*) N. W. P. v. 7, p. 511. (*b*) S. D. A. 1848, p. 346. *See* 1856, p. 328.
(*c*) N. W. P. v. 10, p. 684. (*d*) N. W. P. v. 10, pp. 684, 378.
(*e*) N. W. P. v. 9, p. 352.

evidence on both sides. But the objections of the mortgagor must be specific and distinct, as to each item intended to be disputed: and a mere general charge of falseness and inaccuracy will not be attended to(*a*).

A judge is not bound to adopt the accounts which he believes to be false, either of one party or of the other, but, rejecting the detailed accounts furnished, he may on some equitable principle fix a sum, according to his best judgment, as the amount of the annual produce. And in one case, where the judge, doubting the accounts of both parties, valued the lands at the sum assessed on them by the Collector during a period of temporary resumption, the Court considered this a very equitable mode of calculation, and confirmed it(*b*).

But the valuation put upon the lands by the judge must be founded on some distinct tangible ground, and not on mere conjecture or guess according to the best of his information and belief. Thus when the lower Court disallowed the rent entered against certain lands in the yearly rent-roll filed in the Revenue office, and assumed in its place a conjectural rate, obtained from an average of the several rent rates leviable from the other lands in each of the mouzahs which were the subject of the suit, it was held that the average struck in such a manner must be purely arbitrary, and that the enhanced rate fixed on such uncertain grounds, and unsupported by evidence, could not be maintained(*c*).

(*a*) Reg. XV. of 1793, Sec. 11; Reg. XXXIV. of 1803, Sec. 10; N. W. P. v. 6, p. 82; v. 7, p. 607; v. 8, p. 107.

(*b*) N. W. P. v. 4, p. 317.

(*c*) N. W. P. v. 8, p. 107.

It is a very common practice, when there are disputes as to the items of the account, for an Ameen to make out a statement of the collections, from investigation made by him on the spot; and when this is done, the collections are to be assumed as estimated by him, unless objections are at once taken to his report. And it is not proper to put aside the Ameen's report to which no objection has been taken by the parties, and to take the rent-roll as the basis of the accounts. Nor is the rent-roll admissible as conclusive evidence, when the party in possession has filed his papers showing the amount collected(*a*).

The *nikasee* accounts annually given in by the Putwarree, furnish a valuable test of the accuracy of the accounts and papers filed by the parties, and a judge may with great propriety refer to them(*b*). But though they are useful as a test, they are not in any way indispensably necessary, when the details furnished by the mortgagee fully enable the Court to proceed to an adjustment without them. And although the judge may refer to them of his own accord, in order to check accounts given in by the parties, a decree of which they are the sole foundation is bad unless they have been regularly filed in the suit; the judge must not of his own accord send for them to the Revenue office, and from them alone make out an account(*c*).

If the mortgagee makes an admission in his pleadings, as to the amount of his receipts from the land, believing it at

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(*a*) S. D. A. 1852, p. 831. (*b*) N. W. P. v. 5, p. 244; v. 6, p. 32.
(*c*) N. W. P. v. 7, p. 68.

the time to be for his own benefit, he will not afterwards be allowed to contradict or to explain away the statements he has so made(*a*).

As a general rule, the Court will give the mortgagor credit for every sum entered in the accounts rendered by the mortgagee as realized, and will not allow the latter to repudiate any such sum on the ground of its being an illegal cess, or payment which could not have been enforced. On the other hand, such illegal payments when not admitted by the mortgagee, cannot be allowed; and the mortgagor will not be permitted to go into proof of them(*b*). But although the mortgagor will not be credited with sums derived from *haut*, or fair tolls, he is nevertheless entitled to credit for the rent of the land on which the *haut*, or fair was held(*c*).

The gross receipts referred to in the Regulations are the gross sums paid by the tenantry of the estate mortgaged, not merely what actually reaches the mortgagee's hand. And if he creates a middle-man between himself and the tenants, this does not exonerate him from the liability to account for the gross receipts(*d*). He must answer for the rents appearing in the jummabundee, and not merely for his actual collections, unless he can show some good reason for his not having realized the whole rent-roll exhibited in the jummabundee(*e*).

(*a*) N. W. P. v. 8, p. 225; v. 9, p. 371.

(*b*) N. W. P. v. 7, p. 243; v. 8, p. 178; Rep. Sum. Cases, 10th February 1846.

(*c*) Rep. Sum. Cases, 10th February 1846. (*d*) S. D. A. 1852, p. 1137.

(*e*) N. W. P. v. 8, p. 564; v. 9, pp. 159, 201, 465: v. 10, pp. 51, 355.

But if the mortgagee can show sufficient cause for there being a deficiency, he will be liable only for what he actually received. Therefore if the land is held by under-lessees by virtue of leases granted prior to the mortgage being made, so that the mortgagee has not in fact had the full usufruct of it, the mortgagor is to be credited only with the net profits received by the mortgagee(*a*). So if the estate, though nominally in the hands of the mortgagee, is actually managed by the mortgagor(*b*).

It has been already seen, that the mortgagee is responsible for gross mismanagement, or for waste committed by him(*c*). And if he chooses improperly to record certain lands as rent-free, which are not so, he will be charged with the full rent which they would have brought in(*d*).

But he is never responsible for any imaginary profits which might have been made.

A clause in a mortgage deed to the effect, that an allowance shall be made to the mortgagee "for losses," has been held to apply only to losses beyond his control, and not to cover arrears which he wilfully or by negligence allowed to remain outstanding(*e*).

All expenses fairly incurred in respect of the property will be credited to the mortgagee. He will be allowed a charge for the wages of Chowkeydars and Putwarrees, which form regular items in village expenses, altogether independent of the will of the mortgagee, and which he, as a representative of the owner, is compelled by the orders of Government to

(*a*) N. W. P. v. 8, pp. 107, 112, 564. (*b*) N. W. P. v. 10, p. 115.
(*c*) *Supra*, p. 101. (*d*) N. W. P. v. 9, p. 525. (*e*) N. W. P. v. 9, p. 159.

disburse(*a*). But those payments only will be allowed which have been *boná fide* made: and therefore where the possession of Jagheer or service land by the Chowkeydars of each mouzah, was shown by the entries of rent-free lands under their names in the yearly jummabundees, a charge for Chowkeydars was struck out of the mortgagee's account(*b*).

The reasonable costs of collection and management will also be allowed; and, in the Agra Court, it seems that as a general rule, 5 per cent. will be held to be a proper charge when the villages are settled, or when they are sub-let, and 10 per cent. when they are not settled or sub-let: there being more trouble in the case of the latter, and an allowance for contingent expenses being considered not improper(*c*).

In one case, the lower Court allowed the mortgagee who had been in possession, only 7½ per cent. for village expenses, collection and management. On appeal, it was held that this was wrong, and that the mortgagee was "entitled to the usual deduction of 10 per cent." for collection and management, and also to the charges on account of the putwarree and police, together with losses incurred in batta or exchange(*d*).

The percentage for collection, is apparently charged on the gross rental(*e*). And it is considered to cover ordinary balances(*f*).

(*a*) N. W. P. v. 7, pp. 248, 477; v. 8, pp. 107, 564.

(*b*) N. W. P. v. 8, p. 107: *and see* generally as to what will be allowed, v. 9, pp. 201, 371: v. 10, pp. 355, 378.

(*c*) N. W. P. v. 7, p. 477; v. 8, pp. 112, 564.

(*d*) N W. P. v. 8, p. 564; v. 9, p. 371.

(*e*) N. W. P. v. 8, p. 112. (*f*) N. W. P. v. 9, p. 371; v. 10, p. 51.

A mortgagee is to be allowed all payments in respect of Government revenue, made by him while in possession; and this, whether the revenue fell due after the making of the mortgage or before it, the mortgagee being entitled to do any thing which it is the duty of the mortgagor to do in order to secure the possession of the land for him(*a*).

But if it has been expressly agreed that these charges shall be borne by the mortgagee, he will, of course, not receive credit for them in passing his accounts(*b*). Nor on the other hand, will he be debited with any thing which it has been specially agreed he shall not be liable for. And therefore when there was a provision that the mortgagor should make good the balances of rent unpaid by the cultivators, the mortgagee was held not to be liable for such balances, with which the mortgagor sought to charge him, on the ground of their having been lost through his neglect(*c*).

A mortgagee who being in possession, lets the estate fall into arrears, in consequence of which the Collector enters on the land for a time, must account for the full profits of the whole of that period, just as if he had never been disturbed in his possession,—it being his duty, in the absence of an express stipulation to the contrary, to pay the Government revenue before disbursing any other sum(*d*). And this is so, even when the balance did not originally accrue from his own personal default, but arose from the default of the owners of

(*a*) S. D. A. 1848, p. 346; 1852, p. 1063; N. W. P. v. 7, p. 7.
(*b*) N. W. P. v. 8, p. 225. (*c*) N. W. P. v. 7, p. 477. *But see* v. 9, p. 159.
(*d*) N. W. P. v. 3, p. 417. *See* v. 7, p. 7: v. 9, p. 465: v. 10, p. 553.

other lands, which together with those mortgaged formed a single undivided mehal, every portion of which was responsible for the revenue due in respect of the whole. The possibility of the proprietor of one mouzah being called upon to make good arrears unpaid by the proprietor of the other, necessarily arose out of the nature of the tenure, and was one for which the mortgagee was as much bound to provide, as for the revenue paid by the mouzah which was pledged to him(*a*).

But the mortgagee will not be liable if the default, though nominally made by him, is in reality that of the mortgagor(*b*).

If the nature of the mortgage agreement is such that there is an annual payment to be made to the mortgagor, and these payments are allowed to fall into arrear, the law of limitation will have effect, and the mortgagor cannot, when the accounts are taken, be allowed credit for sums which became due more than 12 years previous to the institution of the suit. Therefore when the contract was, that the mortgagee should pay an annual rent of 40 Rupees to the mortgagor, but no payment was in fact made for many years, the mortgagor was credited with rent for 12 years only, his claim for the rest that was due being barred(*c*).

(*a*) N. W. P. v. 9, p. 164. *See* S. D. A. 1855, pp. 81, 44.
(*b*) N. W. P. v. 11, p. 115. (*c*) S. D. A. 1850, p. 205.

CHAPTER XII.

OF MOFUSSIL MORTGAGES IN RELATION TO THE LAW AND PROCEDURE OF THE SUPREME COURT.

It may be, that the Supreme Court has a concurrent jurisdiction with the Courts of the East India Company, in a matter connected with a mortgage which is about to become the subject of litigation; and in such a case the plaintiff has his election, and may bring his suit in either Court. But if he seeks his remedy in the Mofussil Court, his title will be tested by, and disposed of according to the Mofussil law(*a*).

If he sues in the Supreme Court, his title will be tested and disposed of, according to the law as there administered. What that law is as regards mortgages, when the defendant is a Mahomedan or Hindu, seems to be doubtful. It has however been ruled, that when the evidence shows that the contract was made *especially with reference to the Mofussil law*, the Supreme Court must decide the case according to that law, although it would not be bound to follow the Mofussil Courts as to matters of *mere procedure*. In delivering the

(*a*) S. D. A. 1847, p. 354.

judgment of the Court in the case of Skinner *v.* Sandyal(*a*), the Chief Justice Sir Lawrence Peel said: "A preliminary question arises, viz., by what law should the cause be decided? It is a case of contract, and the defendants are Hindus, and by the terms of the statute the contract should be governed by their law. But in truth the law of mortgages in the Mofussil now depends on the Regulations, and not simply on the Mahomedan or Hindu law, and that statute consequently furnishes no rule. Had the evidence shown that these contracting parties had contracted with reference to a different law than the law of the *forum*, then, as we conceive that it would be perfectly competent for them to do so, the Court must have decided the case by the law of their adoption. There is certainly considerable difference between the law of mortgages as administered in the Company's Courts and the law of mortgages as applied in this Court. Still the fundamental principle under both systems, is that the mortgage security is to be a security for principal interest and costs only; and in whatever form it be taken, so far as it is a mortgage security, it will not be allowed to have any other effect. The law as to land tenure in India, and the effects of the revenue system there on the rights of proprietors or of persons interested in lands, are very different from the law of real property in England, and the effects of any fiscal laws upon land; and may well justify the adoption of securities differing

(*a*) Supreme Court 4th August, 1855. *And see* Doe d. Sibchunder Doss *v.* Sibkissen Bonnerjee, 1 Boulnois' Rep. p. 70.

from those which are commonly adopted under the English law. And when the forms of securities which are adopted in Mofussil mortgages, and the estates which are created there to give effect to such securities, obtain in contracts between British subjects, or between British subjects and natives, the adoption of them may be evidence that the parties meant, so far at least, to contract on the basis of the local law. The English law has nothing opposed to such an adoption, and incorporation into itself, of a local law not forming part of it."

But the doctrines laid down in this judgment, were scarcely acted upon in the subsequent case of Bholanath Coondoo Chowdry *v.* Unodapersad Roy(*a*). That was a suit brought by a second mortgagee to redeem the first mortgagee, all the parties being Hindus. It was unsuccessfully contended that the Mofussil law governed the case, and that according to it, the first mortgagee having a mortgage in the nature of a conditional sale, could not be redeemed against his will by a second mortgagee.

In the Supreme Court there has been some uncertainty as to the relief to which a mortgagee is entitled on a Mofussil mortgage,—that is to say, whether there ought to be a sale or a foreclosure.

For a considerable period the decree in all cases was for a sale(*b*). More lately, however, the practice has been to follow the intention of the parties, as evidenced by their contract;

(*a*) Supreme Court, 19th July, 1856. This case is as yet unreported, but a report of it will appear in the next number of Mr. Boulnois' Reports.

(*b*) Collydoss Gungapadhia *v.* Sibchunder Mullick, Morton's Rep. 111.

or if the intention cannot be gathered from the terms of the agreement, to allow the plaintiff to make his election.

This rule, and the reasons on which it is founded, are laid down in the following judgment of the Court(a). "Three claims were brought before the Court, in each of which the plaintiff sought an order of foreclosure. Two of these were upon Bengali khuts; the third upon an equitable mortgage constituted by deposit of title-deeds, and an English memorandum in writing declaring the purpose of the deposit. The Court took time to consider whether the relief to be granted on these securities in the event of the non-payment of the sums found to be due thereon respectively, should be a sale or foreclosure. It appears that this Court has ordinarily given effect to Bengali securities of this nature by sale. There seems however to be no reason why, if the Bengali instrument, as many mortgage khuts or bye-bil-wufas do, actually imports a conditional sale, intended to become absolute if the money be not paid by a certain time, this Court should not do what the courts of the East India Company do in like case, and give effect to the security by a decree of foreclosure. The practice of this Court was, we believe, adopted in supposed conformity with the practice of the Court of Chancery in cases of equitable mortgages: the course of practice in England, however, as to the nature of the relief to be granted on equitable mortgages has not been uniform. In some of

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(a) Ramnarain Bose v. Ramconny Paul, and Pertaubchunder Paulit v. Ashlam Holdar, 24th December, 1851.

the earlier cases the decree was for foreclosure, with a direction for an absolute conveyance by the mortgagor. There followed a period in which the ordinary decree was for a sale; and in one or two cases the sale was directed to be immediate. In Parker *v.* Honsefield(*a*), however, Lord Cottenham when at the Rolls decided, that whether the relief granted was sale, or whether it was foreclosure, the period of six months given for redemption by a decree on a legal, must be equally given by a decree on an equitable, mortgage; and in most of the modern cases(*b*), the Court has reverted to the earlier form of decree, and directed a foreclosure, and absolute conveyance. The form of order to be made on a claim founded on an equitable mortgage as issued by the Court of Chancery, and adopted by this Court, also shows that foreclosure is now considered in general cases the proper mode of relief. There are however exceptional cases; and such decisions as Sampson *v.* Pattison(*c*) and Lister *v.* Turner(*d*) show, that if the security afford evidence that a sale and not a foreclosure was in the contemplation of the contracting parties, the relief granted will be the former. In the case of Ramnarain Bhose *v.* Ramcunny Paul, we think there is such evidence. The parties have expressly stipulated that in the event of the non-payment of the money the property shall be sold. In this case therefore we think

(*a*) 2 Mylne and Keene, p. 419.

(*b*) *See* amongst others Ball *v.* Harris, 8 Simons, p. 485, confirmed on appeal, 4 Mylne and Craig, p. 264; Tylee *v.* Webb, 6, Beavan, p. 552; Holmes *v.* Turner, 7 Hare, p. 369.

(*c*) 1 Hare, p. 533. (*d*) 5 Hare, p. 281.

the decree should be for sale. In Pertaubchunder Paulit *v.* Ashlam Holdar the security says nothing about a sale; it does not clearly define what is to be done in default of payment, but it is termed a khut mortgaging lands, and there seems to us to be no reason why, if the plaintiff prefer it, he should not have the usual order of foreclosure. In the other case, the order may be the usual order of foreclosure on an equitable mortgage by deposit."

In every case, the Court may now decree a sale instead of a foreclosure.

By Section 17 of the new Equity Act(*a*), it is enacted that the Court may, in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct.

Whether the mortgage be by conditional sale or not, the mortgagee will, in the Supreme Court, be allowed to recover the money advanced by him, with interest, on default being made by the mortgagor in payment at the appointed time.

At first, however, the Court seems to have entertained doubts on this point, and in one or two instances, it was held that when the terms of the contract implied that the

(*a*) Act VI. of 1854.

mortgagee was to look to the land alone for payment, he could not recover the money debt(*a*).

But it has now been long established, that an action for money lent will lie, on the expiration of the time limited, the mortgage being treated merely as evidence of the original loan, —and such actions are of frequent occurrence(*b*).

A decree obtained in the Supreme Court will be recognized and enforced by the Courts of the East India Company, like one of their own decrees. If, after obtaining a decree in the Supreme Court, the plaintiff is obliged to have recourse to a Mofussil Court in order to have it carried out, the latter is bound to accept and to respect the subsisting decree, and the question which has been decided can be re-opened only in the Court which decided it. So long as the decree stands, "the Mofussil Courts have nothing to say to the nature of the transaction. Instead of acting upon their own laws governing private transactions, they will act on the more general rule which requires them to respect the judgments and proceedings of a Court of competent jurisdiction and authority"(*c*).

A decree for foreclosure having been given in the Supreme Court, the mortgagee sued in the Mofussil for possession of the land, but was resisted by the mortgagor, on the ground that the mortgage had been redeemed. The Court said: "the

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(*a*) Radachurn Seat *v.* Punchanund Sealmony, and Ruggonath Shaw *v.* Ramdun Deb Surmono. Morton's Rep. pp. 233, 4.

(*b*) Tilluckram Puckrassy *v.* Choitmachurn Naut and Sopteram Day *v.* Punchanund Mitter. Morton's Rep. pp. 230, 232, and 233 note(*b*).

(*c*) S. D. A. 1847, p. 354. *See* 1853, p. 859; 1856, p. 323, and Macpherson's Civil Procedure, 3rd Ed. pp. 59—63.

mortgage has been foreclosed; and therefore, no plea of payment of the amount on which the mortgage was effected, can be taken up in this Court, as the foreclosure was made under process of the Supreme Court. No question of the validity or maintenance of the order of the Supreme Court, declaring foreclosure in favour of the appellant before us, in a suit to which the mortgagor himself was a party, can be raised in this Court"(a).

The issuing of notice and other proceedings, which by the Regulation law are necessary preliminaries to a foreclosure suit, being unknown in English as well as in Hindu and Mahomedan law, and being mere matters of procedure, are not requisite when the suit is brought in the Supreme Court. And the Mofussil Court will put the plaintiff in possession, on a suit brought by him for that purpose founded on a decree of the Supreme Court, although that decree was made in a suit, prior to the institution of which no notice of foreclosure was issued. "As we have a decree of the Supreme Court before us, cutting off by express decretal words the equity of redemption against the mortgagor's estate, there remains no room for the issue of the notice admitting of such equity, to the representative of that estate"(b).

But decrees of the Supreme Court cannot be enforced in the Mofussil Courts against any persons, except the parties to the original suit or their representatives. Therefore when the mortgagee sued the mortgagor alone in the

(a) S. D. A. 1850, p. 458. (b) S. D. A. 1853, p. 859.

Supreme Court, and got a decree for foreclosure, and afterwards brought a suit for possession, founded on this decree, against a third party whom he found in occupation of the lands, that party having purchased the mortgagor's rights before the institution of the suit in the Supreme Court, it was held that, as the defendant had not been a party to the original suit, the decree formed no ground for a claim against him in the Mofussil Court(*a*).

So it was held to be quite clear that a Supreme Court decree obtained by a first mortgagee against the mortgagor was not binding on, and could not be put in force against, a second mortgagee in possession, he not having been made a party to the suit in the Supreme Court(*b*).

A judgment for the balance due on a bond, was obtained in the Supreme Court. The bond also expressly pledged as security for the loan, certain property therein specified, and the lender afterwards sued in a Mofussil Court to recover, by the sale of the property pledged, the amount for which he had obtained judgment. The defendants pleaded, that the lender having obtained a judgment of the Supreme Court which was for money only, could not afterwards be allowed to bring an action to have the lands sold. But the Court held, that "the mere fact of the decretal order of the Supreme Court making no allusion to the property, and containing no provision for its sale in execution, could in no way be construed to the prejudice of the lender's lien upon the property, or affect

(*a*) S. D. A. 1853, p. 210.

(*b*) S. D. A. 1853, p. 859. *See* N. W. P. v. 8, p. 316; S. D. A. 1850, p. 458.

his right to bring the property to sale in satisfaction of his decree, free from the incumbrances which had since been created in respect of it"(a).

A mortgagee having obtained a decree of foreclosure in the Supreme Court, sued on it in the Mofussil Court for possession, bringing his suit against the person whom he found in occupation. The defendant pleaded that he had bought the land from the mortgagor, subsequent to the date of the plaintiff's mortgage, but more than twelve years before the institution of the foreclosure suit. The Court ruled that the suit was barred by lapse of time, the defendant having been more than twelve years in undisturbed possession(b).

And it has been held, that when a second mortgagee has obtained a decree for foreclosure in a Mofussil Court, and has had undisturbed possession under that decree for more than twelve years, a suit for possession brought by a first mortgagee, based on a decree of the Supreme Court, is barred by the limitation rule, although instituted within twelve years from the date of his Supreme Court decree(c).

It has, however, been already seen, that the two decisions last cited were right only if in each case it was also proved that the plaintiff's cause of action originated more than twelve years prior to the institution of his suit(d).

(a) N. W. P. v. 8, p. 316.
(b) S. D. A. 1853, p. 210.
(c) S. D. A. 1853, p. 546.
(d) *Supra*, p. 177.

APPENDIX.

PRECEDENTS OF MORTGAGES(a).

I.

PURE USUFRUCTUARY MORTGAGE.

I WRITE this instrument of mortgage of talook Barnagore, in pergunnah Meerbhoom, in the District of Nuddea, the net annual profit of which, after deducting the sum of Co.'s Rs. 400 for the Government revenue, is Co.'s Rs. 500. In consideration of my mortgaging to you the aforesaid talook, I borrow from you the sum of Co.'s Rs. 1,200, re-payable with interest at the rate of 12 per cent. per annum. I will immediately put you in possession of the said talook, and you will collect the rents, &c. thereof: after paying the Government revenue from the said collections, you will apply the remainder to the payment of interest that will accrue due to you on the said sum, and in case there shall be any surplus after such payment of interest as aforesaid, such surplus shall be taken by you in part payment of the principal. You will so remain in possession of the aforesaid talook till the whole amount of my loan, together with interest at the rate aforesaid, is liquidated. Dated, &c.

(a) The first three precedents are nearly literal translations of mortgage bonds on which advances were actually made, and which were afterwards put in suit.

II.

SIMPLE MORTGAGE.

I WRITE this instrument of mortgage of land, situated in Aheeritola Street, in Shootanooty, which I purchased in the year 1820, (that is to say) 17 beegahs, 5 chittaks of land, bounded on the North by the house of Sibchunder Ghose, on the South by a garden belonging to Ramloll Sen, on the East by the house of Rammohun Doss, and on the West by the house of Sreekishen Bhose. In consideration of my mortgaging to you the aforesaid land, I borrow from you the sum of Co.'s Rs. 1,600, which is to be re-paid on the 16th March 1855 with interest, at the rate of 12 per cent. per annum. Every partial payment, which I shall make on account of the said loan, I shall specify on the back of this instrument of mortgage, and no payments that I may make other than those specified on the back of this document, shall be allowed to me(*a*). In default of my paying the abovementioned sum with interest, within the limited time, you will cause the aforesaid land to be sold and pay yourself by the proceeds thereof. I deposit with you the title deeds of the aforesaid land, which shall be returned to me, on the re-payment of the aforesaid loan with interest. Dated, &c.

III.

MORTGAGE BY CONDITIONAL SALE, KUT-KUBALA, OR BYE-BIL-WUFA.

I WRITE this instrument of mortgage of 6 beegahs, 2 chittaks of ancestorial rent-free land, in mouzah Borocota, in the District of

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(*a*) This condition will not be strictly acted on by the Courts; *See Supra*, p. 31; S. D. A. 1853, p. 544; but its insertion can do no harm.

Hooghly, which has for a long time been my property. The said land is bounded on the North by the house of Sibchunder Ghose ; on the South by the house of Shamachunder Mullick ; on the West by a pond belonging to Madhubchunder Paul ; on the East by a piece of land belonging to Mahadeb Sircar. In consideration of my mortgaging the aforesaid land to you, I borrow from you the sum of Co.'s Rs. 175, which is to be re-paid at the end of one year from this date, with interest at the rate of 12 per cent. per annum. In default of my paying the abovementioned sum with interest, within the limited time, I agree to relinquish my interest in the aforesaid land and to put you in possession thereof as rightful owner and proprietor. I deposit with you the title deeds of the aforesaid land, which shall be returned to me on the re-payment of the abovementioned loan with interest. Dated, &c.

IV.

ENGLISH MORTGAGE IN FEE, WITH POWER OF SALE.

THIS indenture, made the day of between A. B., of &c., (mortgagor) of the one part, and C. D., of &c., (mortgagee) of the other part, Witnesseth, that, in consideration of the sum of £ this day paid to the said A. B., by the said C. D., (the receipt whereof the said A. B., doth hereby acknowledge,) he, the said A. B., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, and administrators, that the said A. B., his heirs, executors, or administrators, will pay to the said C. D., his executors, administrators, or assigns, the sum of £ (the principal), with interest for the same in the mean time at the rate of £ per cent. per annum on the day next(*a*), without any deduction. And

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(*a*) Generally six Calendar months from the date of the mortgage.

This Indenture(*a*) also Witnesseth that, for the consideration aforesaid, the said A. B. doth hereby grant and release unto the said C. D., his heirs, and assigns, all those lands, tenements, messuages and hereditaments, situate in the Parish of , in the county of , delineated in the plan in the margin of these presents, and specified in the Schedule hereunder written, together with commons, ways, lights, waters, water-courses, rights, privileges, easements, advantages and appurtenances whatsoever to the said hereditaments, or any part thereof appertaining, or with the same or any part thereof held, used, or enjoyed, or reputed as part thereof, or appurtenant thereto. And all the estate and interest of the said A. B. in the said premises. To hold the said premises unto and to the use of the said C. D., his heirs and assigns. Provided always, that, if the said A. B., his heirs, executors, administrators, or assigns, shall pay unto the said C. D., his executors, administrators, or assigns, the said sum of £

(the principal), together with interest for the same in the meantime at the rate of £ per cent. per annum, on the said day of next without any deduction, then the said C. D., his heirs, or assigns, will, at any time thereafter, upon the request and at the cost of the said A. B., his heirs, executors, administrators, or assigns, re-convey the said premises unto the said A. B., his heirs and assigns, or as he or they shall direct, free from incumbrances by the said C. D., his heirs, executors, or assigns. And it is hereby declared, that the said C. D., his executors, administrators, or assigns, may, at any time or times after the said day of next(*b*) without any further consent on the part of the said A. B., his heirs, or assigns, sell the said premises,

(*a*) When the property mortgaged is situated in India the words "which is executed in pursuance of, and intended to take effect under Act IX. of 1842 of the Legislative Council of India," must be here inserted.

(*b*) The day for payment of the principal sum.

or any part thereof, either together or in parcels, and either by public auction or private contract, and may buy in or rescind any contract for sale, and re-sell, without being responsible for loss occasioned thereby; and may execute and do all such assurances and acts for effectuating any such sale as the said C. D., his executors, administrators, or assigns, shall think fit; And that upon a sale by any person or persons who may not be seized of the legal estate, the person in whom the legal estate shall be vested shall execute and do such assurances and acts for carrying the sale into effect, as the person or persons by whom the sale shall be made shall direct: Provided nevertheless, that the said C. D., his executors, administrators, or assigns, shall not execute the power of sale hereinbefore contained, until he or they shall have given to the said A. B., his heirs, executors, administrators, or assigns, or left on the said premises, a notice in writing to pay off the monies for the time being owing on the security of these presents, and default shall have been made in such payment for six calendar months after giving or leaving such notice. Provided also, that, upon any sale purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to inquire whether the case mentioned in the Clause lastly hereinbefore contained has happened, nor whether any money remains upon the security of these presents, nor as to the propriety or regularity of such sale; and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as regards the purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly. And it is hereby declared, that the receipt of the said C. D., his executors, administrators, or assigns, for the purchase monies of the premises sold, or any part thereof, shall effectually discharge the purchaser or purchasers therefrom and from being concerned to see to the application thereof, or being accountable for the non-application or mis-applicaton thereof;

And that the said C. D., his executors, administrators, and assigns, shall, out of the monies arising from any sale in pursuance of the aforesaid power, in the first place, pay the expenses incurred on such sale, or otherwise in relation to the premises ; and, in the next place, apply such monies in or towards satisfaction of the monies for the time being due on the security of these presents ; and then pay the surplus (if any) of the monies arising from such sale to the said A. B., his heirs, or assigns ; And that the aforesaid power of sale and other powers may be exercised by any person or persons for the time being entitled to receive and give a discharge for the monies then owing on the security of these presents ; Provided always, that the said C. D., his executors, administrators, or assigns, shall not be answerable for any involuntary losses which may happen in the exercise of the aforesaid power and trusts, or any of them. And the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that the said A. B. now hath power to grant and release all and singular the said premises unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, and free from incumbrances ; And that he the said A. B., and his heirs, and every other person lawfully or equitably claiming any estate or interest in the premises, will, at all times, at the request of the said C. D., his heirs, executors, administrators, or assigns, but at the cost of the said A. B., his heirs, executors, or administrators, execute and do all such assurances and acts, for further or better assuring all or any of the said premises to the use of the said C. D., his heirs and assigns, in manner aforesaid, as by him or them shall be reasonably required. In witness whereof the said A. B. and C. D. have hereunto set their hands and seals the day and year first above written.

The Schedule to which the above written Indenture refers.

INDEX.

A.

ABSENCE,

of the mortgagor or his representative, does not prevent foreclosure from taking place, 200.

ACCOUNT,

is to be taken fully in a redemption suit, though the mortgage has evidently not been redeemed, 221.

mortgagor in possession not liable to, 94, 222.

unless he is in, in breach of contract, *ib.*

mortgagee in possession subject to when, 141, 151, 213.

but not if he is in, under some other title, 98.

how made up, 223.

mortgagee must bring into Court full accounts of his receipts and expenditure, 228.

the receipts are the gross sums paid by tenants, not merely what reaches mortgagee's hand, 233, 4.

mortgagee must swear to his accounts when, 228, 9.

mortgagee failing to deliver or swear to his accounts, liable to fine, 229.

if no accounts are filed by mortgagee, the Court will receive any reasonable proof as to his receipts, 230.

when accounts delivered, mortgagor may examine them, 230.

objections must be specific, *ib.*

accounts of both parties may be set aside by judge, 231.

admissions by mortgagee as to receipts may not be retracted, 232.

mortgagor is credited with all sums entered by mortgagee as realized, 233.

mortgagee is debited with the rents appearing in the jumma bundee, *ib.*

but only with actual collections, if he can show good cause for not realizing more, *ib.*

ACCOUNT,—*(Continued.)*
not responsible for *possible* profits, 234.
allowed all fair expenses, and Government revenue paid, 234—237.
but not, if it was agreed they should be borne by him, *ib.*
in taking, no sums allowed, which are barred by lapse of time, 237.
See *Mortgagor. Mortgagee. Foreclosure. Redemption.*
ACKNOWLEDGMENT,
of debt, what is sufficient to stop the limitation rule from running, 167.
See *Limitation.*
ACTION. See *Suit. Cause of Action. Limitation.*
ADMISSION,
mortgagee bound by, as to his receipts, 233.
AGREEMENT,
that on default of payment of the mortgage debt, mortgagee may sell the land, void, 33—36, 104.
See *Power of Sale.*
that mortgagee in possession shall not be accountable, when void, 49, 142, 147.
that mortgagor shall be credited with no payment made by him unless endorsed on the deed, void, 31.
See *Deed. Usury.*
ALIENATION,
by mortgagee of his rights and interests, valid, 103, 4.
cannot alter mortgagor's position, 104.
by mortgagor of his remaining rights and interests, valid, 105.
cannot destroy or injure mortgagee's lien, *ib.*
contrary to contract, void and may be cancelled, 106, 7.
upheld when, 108, 9.
does not entitle mortgagee to sue for the mortgage debt sooner than he otherwise might, 111, 218, 9.
or for the debt instead of for possession, *ib.*
by sale on account of Government revenue, destroys lien of mortgagee, 97—101.
if such sale is owing to mortgagor's default, he is liable to immediate suit for the mortgage debt, 47, 218.
See *Execution. Purchaser.*

AMEEN,

judge may depute, to report on the value of lands, and the receipts of mortgagee, 232.

objections to report of, must be taken *at once*, *ib.*

ARREARS. See *Revenue (Government).*

ASSESSMENT. See *Valuation of Suits.*

ASSIGNEE. See *Alienation.*

of mortgagee, liable to mortgagor for waste, 101.

ATTENDANCE,

personal, of mortgagee on filing his accounts requisite, when, 228, 229.

See *Account.*

AUCTION. See *Execution. Mortgagee. Mortgagor.*

B.

BAR TO SUIT. See *Limitation.*

BOND. See *Charge. Deed. Instalment. Jurisdiction. Stamp.*

BYE-BIL-WUFA. See *Mortgage.*

C.

CANCELLATION. See *Alienation. Hindu Law.*

CAUSE. See *Valuation of Suits.*

CAUSE OF ACTION,

Origin of, what, 133—135, 161—182.

See *Limitation.*

CHARGE,

of subsequent advances, on lands already mortgaged to the lender, effect of, 53—5.

COLLECTION,

and management, costs of, allowed the mortgagee, 234, 5.

See *Account.*

COLLECTOR. See *Revenue (Government).*

CO-MORTGAGEE. See *Mortgagee.*

CO-MORTGAGOR. See *Mortgagor.*

COMPOUND INTEREST. See *Interest.*

CONDITION. See *Agreement. Deed. Interest. Usury.*

CONDITIONAL SALE. See *Mortgage. Mortgagor. Mortgagee. Foreclosure. Redemption.*

CONSIDERATION,
given, whether it must be proved, when there is no duly executed deed, 56.
when there is a duly executed deed, 56—66.
recital of the, in the deed or plaint, inconsistent with that proved, 59, 60, 64.
recitals as to, generally taken as *primâ facie* evidence of, 65.
registrar has no right to inquire into, on a deed being presented for registration, 71, 2.
See *Usury.*
CONSTRUCTION. See *Deed.*
"redeemable sale," held to be the same as mortgage by conditional sale, 29.
lease where lender is to hold on till repaid, is a pure usufructuary mortgage, 11, 29.
CONTRACT. See *Agreement. Deed.*
COSTS,
of third party who intervened successfully in foreclosure suit, thrown on mortgagee, 220.
COVENANT. See *Agreement. Deed.*

D.

DEATH. See *Notice of Foreclosure.*
DECREE,
a conditional decree for redemption, "if the mortgagor shall pay a certain sum," is bad, 158.
when not so, *ib.*
See *Execution. Supreme Court.*
DECREE-HOLDER. See *Execution.*
DEED,
not essential that a mortgage should be by, 25.
terms of, may be varied by verbal agreement, 28.
construed according to apparent intention of the contracting parties, *ib.*
if ambiguous, in manner most favorable to mortgagor, 30.
of mortgage, what it ought to contain, 17, 26, 7, 31, 36.
seal and signature to, 67, 77.
delivery of, not essential, 67, 68.
See *Agreement. Consideration. Interest. Registration. Stamp. Usury.*

DEFAULT. See *Redemption.*

DEPOSIT, (IN COURT OF MORTGAGE DEBT,)
- must be made by one entitled to redeem, 118—124.
- must be of cash, 137, 202.
- when sufficient, 137, 149, 202—207.
- must be made before expiry of year of grace, 201, 204.
- must be unconditional, 205.
- See *Foreclosure. Redemption. Tender. Year of Grace.*

DEPOSIT OF TITLE DEEDS,
- as security for debt due, effect of, 26.
- mortgagee should always require, *ib.*

DOWER. See *Mahomedan Law.*

DEWUTTUR. See *Hindu Law.*

E.

ELUSIVE AGREEMENTS. See *Usury.*

EQUITABLE MORTGAGE. See *Deposit of Title Deeds. Supreme Court.*

EXECUTION,
- in, of decree against the mortgagor, his rights and interests in property mortgaged by him may be sold, 110.
- decreeholder who sells first, has priority over others, *ib.*
- sale of mortgagor's rights in, does not injure existing lien, 110, 111, 218.
  - does not excuse mortgagee's departing from usual course, *ib.*
  - on mortgagee should give notice of his lien, 112.
- sale of mortgaged land in, as being the property of a third party, destroys mortgagee's lien, 96, 113.
- See *Judgment Creditor. Mortgagee. Mortgagor.*

F.

FAMILY. See *Hindu Law.*

FAQUEER. See *Hindu Law.*

FINE,
- mortgagee liable to, who does not file or swear to proper accounts in Court when required to do so, 229.

FORECLOSURE,
- occurs only in mortgages by way of conditional sale, 184.
- summary proceedings towards, 189—210.
- See *Notice of Foreclosure. Representative. Deposit. Year of Grace.*

FORECLOSURE,—*(Continued.)*
may take place in absence, and without the knowledge, of mortgagor, 200.
complete, if mortgagor admits in Court the mortgagee's claim, and puts him in possession, 207.
quære, whether complete against a *bonâ fide* purchaser, *ib.*
regular suit for possession on, must be brought after lapse of year of grace, 211.
proceedings in it, 211, 2.
decree in favor of mortgagee, unless mortgage was redeemed before the end of the year of grace, 213, 4.
right of, once renounced cannot be resumed, 214.
in suit for possession on, decree for money cannot be given, 216.
mortgagee having obtained a decree for possession, entitled to immediate possession, *ib.*
mortgagee by conditional sale must sue for, and possession, and not for the money debt, 216—219.
otherwise, if he can show good cause, *ib.*
final decree for, cannot be opened up, unless bad in itself, 160.
See *Mortgagee. Mortgagor.*
FURTHER ADVANCE. See *Charge.*

G.

GOVERNMENT. See *Revenue (Government).*
GUARDIAN,
personally liable or money advanced for what Court does not consider to be for minor's benefit, 17, 18.
See *Minor.*

H.

HAUT,
or fair tolls, which could not legally be exacted, mortgagee when bound to account for, 233.
mortgagor entitled to credit for rent of land on which the fair was held, *ib.*
See *Account. Illegal Cess.*
HINDU LAW,
properties of a mortgage under the, 3—6.
where Mithila doctrine prevails, mortgage of joint undivided property bad, without consent of all sharers, 18, 19.

HINDU LAW,—*(Continued.)*
exception to this rule, 19.
when Hindu widow can mortgage husband's property devolved on her, 20.
in Calcutta Sudder Court the presumption is against the validity of such mortgage, *ib.*
in Supreme Court the presumption is in favour of it, 20—3.
suit to set aside mortgage by, to be brought by whom, 23.
by, mortgage of lands devoted to religious purposes, or of the profits of such lands, effect of, 23, 24.
Faqueers attached to a temple, are not the proper parties to sue to set aside mortgage of it, 24.

I.

ILLEGAL CESS,
in accounting, mortgagor not to be credited with any illegal cesses collected by mortgagee, 233.
unless the mortgagee admits them, *ib.*
See *Account.*
INFANT. See *Minor.*
INSTALMENTS,
mortgagee need not accept payment by, 207.
See *Limitation.* *Valuation of Suits.*
INTEREST,
no limit as to rate of, in contracts under Act 28 of 1855, 36.
at a higher rate than 12 per cent., direct or indirect agreement for, made prior to Act 28 of 1855, void, 36—49, 227.
if such agreement is "elusive" of the law, neither principal nor interest can be recovered, 36—49.
at a higher rate than 12 per cent., is allowed in cases where any extraordinary risk is incurred by lender, 49—51, 200.
in accounting, generally allowed on the payments of both parties, 223.
generally allowed on mesne profits, *ib.*
but not, if the Court sees reason otherwise, 225, 226.
what rate of, usually allowed, 225.
but it is in the Court's discretion, *ib.*
and agreement to take less always enforced, 198.

INTEREST,—*(Continued.)*
is to be given, even when the parties are both Mahomedans, 226.
compound interest, when not given, 227.
See *Account. Usury.*
INTERVENTION,
of third party, mortgagor must protect mortgagee against, 96, 220.
See *Costs. Foreclosure.*

J.

JOINT OWNERS. See *Hindu Law. Mortgagee. Mortgagor.*
JUDGMENT CREDITOR,
not entitled to redeem, against consent of mortgagee, 119.
See *Execution.*
JURISDICTION,
suit for redemption or foreclosure, where to be instituted, 138, 183, 189.
suit for money advanced on mortgage, where to be instituted, 183.
See *Supreme Court. Valuation of Suits.*

K.

KUT-KUBALA. See *Mortgage.*

L.

LEASE,
Zur-i-peshgee, on advance, a pure usufructuary mortgage, when, 11, 29, 141.
mortgage may be accompanied by a lease, under which mortgagee has possession, 14, 15.
See *Mortgage.*
LIEN,
of mortgagee extends to that which represents the property originally mortgaged, if its nature has been changed through the mortgagor, 105.
See *Mortgage.*
LIMITATION, (OF SUIT.)
all suits must be brought within twelve years from the origin of the cause of action, 132, 161.

LIMITATION (OF SUIT,)—(*Continued.*)
exceptions, demand within the time, and admission by defendant of right claimed, 161.
suing within the time in a competent Court, 161.
minority, or other good cause, *ib.*
time never runs so as to bar a redemption suit, 132.
but it runs so as to bar a suit by mortgagor for wasilat, 133.
time *in all cases* runs in usual manner against mortgagee, 161.
if loan is repayable on certain day, suit for money must be brought within twelve years from that day, *ib.*
if possession to be given on certain day, suit for possession must be brought within twelve years from that day, 161.
surplus proceeds of revenue sale of mortgaged lands, must be sued for within twelve years from date of sale, 163.
"on default of payment of any one instalment, mortgagee to have possession," suit for possession to be brought within twelve years of *first* default, 166.
each instalment to be sued for within twelve years of due date, *ib.*
what is an admission of debt so as to prevent suit being barred, 167, 8.
what is an application to a competent Court, 169—171.
when suit for possession or foreclosure is in time, if within twelve years from expiry of year of grace, 172.
twelve years undisturbed possession under a *boná fide* title held to give holder complete title, *sed quære*, 173—180.
pleading, 181.
what is *boná fide* possession, 181.
so as to third parties, counts from date of mortgage contract, 182.
expiry of time during a vacation no excuse, 182.
otherwise, if Court is accidentally and improperly shut, *ib.*
LUNATIC, cannot make a valid mortgage, 16.

M.

MAHOMEDAN LAW,
properties of a mortgage under the, 1—3, 5.
alienation of dower lands by Mahomedan widow, without consent of her husband's heirs, bad, 23.
mortgage of *mal-i-wuqf*, land devoted to religious purposes, by *mutuwallee*, effect of, 23, 24.

MAHOMEDAN WIDOW. See *Mahomedan Law.*
MALIKANA. See *Lien.*
MINOR,
cannot make a valid binding mortgage, 16.
mortgage by guardian of, will be good if *boná fide* for the benefit of minor's estate, *ib.*
in suit by, to set aside mortgage, presumption is in favor of its being *boná fide* and good, *semble*, 17.
otherwise, in suit by mortgagee to enforce, *ib.*
if money is borrowed on account of, this should appear in the mortgage deed, *ib.*
guardian must pledge property of, *quá* guardian, *ib.*
ratification by, after attaining majority, of acts of himself or guardian, 18.
See *Limitation. Notice of Foreclosure.*
MISCELLANEOUS DEPARTMENT. See *Limitation*, 169—171.
MOHUNT. See *Hindu Law.*
MORTGAGE,
the different kinds of, 9—15.
Pure usufructuary, what is, 10—12, 95.
Simple, what is, 12.
By Conditional sale, Kut-kubala, Bye-bil-wufa, what is, 13.
is identical with *redeemable sale*, 29.
See *Mortgagee. Mortgagor. Foreclosure. Redemption.*
absolute conveyance may be converted into a mortgage, by agreement subsequent, 27, 164.
contract, may be either verbal or by deed, 25.
single deed of, of two mouzas each having a separate jumma, creates an indivisible lien over both, 125.
of property *to be* acquired, held to be null, 32, 3.
so of property *generally* without defining it, *ib.*
See *Deed. Consideration. Registration. Stamps. Usury.*
who may, 16—24.
See *Hindu Law. Mahomedan Law. Minor. Lease.*
MORTGAGEE,
in pure usufructuary mortgage, entitled to possession, 10—12.
can never become absolute owner of the mortgaged estate, 12, 184.

MORTGAGEE,—(*Continued.*)
must not sue for possession on the ground of proprietary right, 96.
in simple mortgage, not entitled to possession, 12, 95.
not entitled to registration in Revenue books, 95.
or to appear and take part in settlement proceedings, *ib.*
how security enforced by, 13, 185—8.
may purchase the land when sold in execution, 13, 188.
entitled to what decree, 185, 6.
in simple mortgage usufructuary, entitled to possession, 14.
security enforced by, how, *ib.*
in conditional sale, cannot get possession until foreclosure, 13.
has no remedy against the mortgagor personally, 13, 216, 218.
unless for some special cause, 112—116, 217—219.
cannot sue to foreclose, till the period agreed upon has elapsed, 185.
need not accept a conditional deposit, 205.
nor payments by instalments, 207.
in cases of conditional sale, &c., usufructuary, entitled to possession, 14, 15.
enforces his security, how, *ib.*
within what time he must sue, as regards the limitation law, 161—182.
money advanced in equal sums by two, one may sue for his own share without making co-mortgagee a party, 184.
in possession, is a trustee for mortgagor, 94.
need not receive payment from any one but the mortgagor or his representative, 119.
takes subject to any existing lien or incumbrance, 95.
when he may register in collector's books, *ib.*
entitled to be protected in his rights by the mortgagor, 96—113.
in possession, must pay the Government revenue, 97—101.
but will be allowed credit for such payments, 98, 236.
in possession, failing to pay revenue, so that lands are sold, cannot purchase, *semble*, 100, 1.
if he does, he is trustee for the mortgagor, *ib.*
who is to be repaid from usufruct, must remain in possession so long as any thing is due, when, 113—116.

MORTGAGEE,—(*Continued.*)
in possession, must see to proper management of estate, and pay all regular village expenses, 102, 234.
responsible for waste, *ib.* 101.
may transfer his right as mortgagee, 104.
exercise by, of a power of sale, not allowed, 33—36, 104.
rights of, not destroyed by subsequent act of mortgagor, 105, 218, 9.
extend over what represents original mortgage, *ib.*
may set aside improper alienation by mortgagor, when, 106—8.
lien of, cannot be broken up without his consent, 125—9.
may hold in other right as well as that of mortgagee, 98, 131.
not entitled to interest after rejecting a proper tender, 138.
when he must account, 138—148, 151, 157.
must deliver up the mortgage, and any title-deeds on a proper tender or deposit, 149, 210.
entitled to have money deposited in court paid to him at once, 210.
having renounced right to foreclose, cannot resume it, 214.
may recover damages, if kept out of possession after decree, 216.
entitled to surplus proceeds of lands sold for arrears of revenue, not sold through his default, 219.
may recover them from the collector or the mortgagor, *ib.*
not obtaining possession according to contract, may sue for the money lent, when, 112—116.
breaking his contract vitiates mortgage, when, 116.
See *Account. Foreclosure. Interest. Limitation. Mortgagor. Redemption. Tender. Usury.*

MORTGAGOR,
in cases of pure usufructuary mortgage, must give the mortgagee possession, 10, 112.
what his personal liabilities are, 11.
may redeem at any time, 12, 138—147.
when entitled to an account from the mortgagee, *ib.*
in cases of simple mortgage, personally liable, 12, 185.
may redeem until sale, 12, 148.
in cases of conditional sales, kut-kubalas, &c., not personally liable, 13, 216, 218.
and may redeem until foreclosed, 14, 150.

MORTGAGOR,—*(Continued.)*
in cases of simple mortgage *usufructuary*, personally liable, 14.
on default, land will be sold in execution, *ib.*
may redeem until sale, 14, 148.
entitled to an account from the mortgagee, 148.
in cases of conditional sale, &c., *usufructuary* not personally liable, 14, 15.
on default may be foreclosed, *ib.*
when entitled to account from mortgagee, 15, 151—7, 221.
never accountable to mortgagee, *ib.*
must protect his property for the mortgagee, 94, 96, 112—116.
in possession, pays Government revenue, 97.
may recover damages from mortgagee for waste, 101.
may transfer, or mortgage, his equity of redemption, 105.
no act of, can injure mortgagee's lien, *ib.* 218.
sale, or mortgage by, contrary to contract, 106—9.
equity of redemption of, may be sold in execution of decree, 110—112.
effect of his not giving the mortgagee possession, according to contract, 112—116.
See *Account. Foreclosure. Mortgagee. Redemption. Representative. Tender. Usury.*
MUTUWULLEE. See *Mahomedan Law.*

N.

NIKASEE ACCOUNTS,
may be referred to by the judge in taking accounts, 232.
but the judge is not bound to refer to them, *ib.*
nor is a decree good, of which they are sole foundation, *ib.*
See *Account.*
NOTICE,
to mortgagee of deposit having been made, 149, 204.
NOTICE OF FORECLOSURE,
what is, 189, 196.
issued, on what grounds, 189, 190.
issues from court of zillah in which mortgaged property lies, 190.
if property lies in several districts, notice from one court sufficient, *ib.*
to be issued as soon after application as possible, 191.

NOTICE OF FORECLOSURE,—(*Continued.*)
bears date on day of actual issue, 191, 192.
year during which mortgagor may redeem, counts from actual issue, not from date of service, 192.
must be served on the mortgagor or his "legal representative," 193.
service on whom sufficient, 193—196.
if once properly given, sufficient, although parties entitled change during year of grace, 193.
served on guardian of minor, 195.
when estate under Court of Wards, *ib.*
service of, need not be personal, 196—200.
but if possible, it must be so, *ib.*
must be issued and served in regular course, although mortgagor is aware of mortgagee's intention, 200.
and other summary proceedings, of no weight by themselves, 169, 200, 212.
See *Year of Grace. Representative.*

O.

OATH. See *Account.*

P.

PAROL AGREEMENT,
mortgage by, valid, 25.
PAROL EVIDENCE,
admissible, to vary or modify written deed, 28, 44, 5.
PARTITION,
mortgagee of a share of a joint estate not entitled to sue for, 103.
PARTNERS. See *Mortgagee. Mortgagor.*
PAYMENT INTO COURT. See *Deposit.*
PLEADING,
what objections will be taken up by the court, *suo motu*, without being specially pleaded, 77, 82, 92, 181, 219.
mortgagor seeking account how far he must aver in his plaint, that the mortgage debt has been fully liquidated, 157, 222.
in redemption suits, 135, 6.
See *Usury. Valuation of Suits.*
PLEDGE. See *Mortgage.*

POSSESSION. See *Mortgage. Foreclosure. Limitation. Redemption.*

POWER OF SALE,
on default of mortgagor, given by mortgage deed to mortgagee, void, 33—36, 104.
not so in English law, 35.

PRIORITY. See *Charge. Execution. Mortgagee.*

PROOF. See *Consideration. Minor. Registration.*

PURCHASER,
of mortgagor's rights and interests, not personally liable for the original mortgage debt, 106.
See *Alienation. Execution. Mortgagee. Mortgagor.*

PUTWARREE,
charge for wages of, and chowkeydars, to be allowed in accounting, 102, 234.
but only if actually paid, *ib.*
See *Account.*

R.

RATIFICATION. See *Minor.*

REDEMPTION,
right of, vested in mortgagor and his representatives, 118.
holder of decree against mortgagor, has not the right of, 119.
who are the mortgagor's "representatives," 118—124, 193—6.
See *Representative.*
right of, may be reserved to third party, by mortgage contract, 124.
cannot take place, even as to part until whole debt is paid, 125—129.
mortgagee's lien cannot be broken up, 125.
one of joint mortgagors may redeem the whole, 127.
but only on payment of whole debt, *ib.*
exception to this rule, 129.
one who is real, though not nominal, mortgagor may redeem, *semble*, 130.
cannot take place after foreclosure or sale, *ib.*
right of, once formally relinquished cannot be resumed, 130, 213—4.
suit for, will not lie, if mortgagee is in possession under a title other than that of mortgagee, 131.

REDEMPTION,—*(Continued.)*
right of, never barred by lapse of time, 132—5.
when complete, 135.
See *Deposit. Jurisdiction. Tender.*
Of Pure usufructuary Mortgages.
former practice as to, 7, 138.
complete, when mortgagee has received principal and interest, or it has been tendered, 140.
can be carried out by regular suit only, 141.
in suit for, mortgagee must account, when, 138—148.
in a *zur-i-peshgee* lease, mortgagee can be made account, when, *ib.*
Of Simple Mortgages.
complete on paying or tendering principal and interest, 148, 9.
Of Mortgages by Conditional sale, Kut-hubula, or Bye-bil-wufa.
when mortgagee has not had usufruct, by paying, tendering, or depositing in court, what is due for *principal and interest*, 148—151.
when mortgagee has had usufruct, by tendering or depositing the *principal* sum advanced, 151.
mortgagor entitled to possession on deposit *summarily*, 151.
what rule when suit is brought before, or after, the date fixed by mortgage deed, 151—7.
judge gives depositor a receipt, 149.
and gives mortgagee notice of deposit, *ib.*
may take place, up to end of the year of grace, 150.
exception, *ib.*
the adjustment of account, is carried out by regular suit, 151.
court cannot give a conditional decree for redemption on payment, when, 158.
suit for, must be brought within twelve years from the expiry of the year of grace, 158, 9.
suit for, in no case to be dismissed without the accounts being taken, 221.
REGISTRATION,
of deeds, not absolutely necessary, 67—72.
registered mortgage has priority over unregistered, 69.
registered *mortgage* has not priority over an unregistered *sale* of earlier date, *nor vice versâ*, 70.

REGISTRATION,—(*Continued.*)
of not "authentic," or fictitious, deed, gives no priority, 70, 71.
on presentation for, due execution of the deed must be ascertained by registrar, 71.
but no inquiry as to the consideration for it, may be made by the registrar, 71, 72.
gives no validity to a deed, 46, 58.
to be made, where, and when, 69.
RENT. See *Mortgage. Stamp.*
REPRESENTATIVE (OF MORTGAGOR),
notice of foreclosure must be served on the mortgagor, or his "legal representative," 189—196.
purchaser *out and out* of mortgagor's rights by public or private sale is, 194.
a second or other mortgagee, is not, *ib.* 120—4.
holder of decree against mortgagor, is not, 119.
See *Notice of Foreclosure. Mortgagor. Redemption.*
REVENUE (GOVERNMENT),
is a charge on land, taking precedence of all other claims, 97.
to be paid by person in possession, *ib.*
sale of lands for arrears of, destroys mortagee's lien, *ib.*
on sale of lands for arrears of, through default of mortgagor, mortgagee may at once recover the money debt, *ib.*
sums paid for, by mortagee, credited to him, 98.
not recoverable in a separate action against the mortgagor personally, *ib.*
mortgagee who allows estate to fall into arrears, cannot when it is sold acquire an irredeemable interest in it, *semble*, 100.
surplus proceeds of lands sold for arrears of, belong to mortgagee, unless default was his, 219, 220.
See *Account. Mortgagee. Mortgagor.*

S.

SALE. See *Alienation. Execution. Revenue. Power of Sale.*
SERVICE. See *Notice of Foreclosure.*
SICCA RUPEES,
value of how calculated, for stamp, 82.

SIMPLE MORTGAGE. See *Mortgage.*
STAMPS,
On Deeds.
Regulations as to, do not alter the laws of property, 73.
deed cannot be enforced till stamped, *ib.*
should be stamped before execution, 74.
may in some cases be stamped after execution, 74, 81.
scale of, on mortgage deeds, 75, 76.
on a deed, or writing, on more than one sheet of paper, 77.
when mortgage deed contains other matters, *ib.*
when deed contains various matters, stamp must be the largest that it is liable to, 78.
unless the other matter is surplusage, 80.
deed, which is the foundation of a suit, or defence, must be stamped before date of bringing suit, or filing plea, 81.
courts how far bound by decision of revenue authorities as to sufficiency of, 83.
pleading, as to, 77, 81, 82, 83.
On Suits connected with Mortgages.
scale of duties payable, 84, 83—93.
See *Valuation of Suits.*
SUB-MORTGAGEE. See *Alienation. Representative.*
SUIT. See *Jurisdiction. Valuation.*
SUPREME COURT,
may have concurrent jurisdiction with mofussil court, 238.
suit brought in, disposed of according to what law, 238—240.
doubts as to remedy to be given in the, on mofussil mortgages, 240.
decree follows the intention of the parties, 240—3.
in the, a sale may always be decreed instead of foreclosure, 243.
in the, mortgagee whatever the kind of mortgage, may sue for the mortgage debt, 243.
decree of, enforced by Courts of East India Company as one of their own decrees, 244.
mofussil court cannot question decree of, 244, 5.
decrees of, of no effect in mofussil court against any one, who was not a party to the original suit, 245.
decree of, for the money debt, no bar to suit in mofussil court against the land, 246.
See *Hindu Law. Jurisdiction. Limitation.*

T.

TENDER,
or deposit must be made in cash, generally, 137, 202.
made according to contract, when good, *ib.*
not sufficient unless in accordance with strict letter of Regulation or contract, *ib.*
must be unconditional and unrestricted, 204—7.
must be in one sum, 207.
See *Deposit. Year of Grace.*
TITLE DEEDS. See *Deposit.*
must be given up by mortgagee, when the mortgage is redeemed, 149, 210.

U.

USURY,
contracts to pay more than twelve per cent., when usurious, 36—53.
whether verbal or otherwise, equally usurious, *ib.* 45.
on usurious contract no interest is recoverable, 37, 38.
if "elusive" neither principal nor interest recoverable, *ib.*
what transactions are "elusive," 38—47.
pleading pleas of, 40, 51, 52, 53.
relief as to, limited to terms of plea, *ib.*
laws against, do not apply when there is any extraordinary risk, 49—51, 227.
See *Account. Interest.*

V.

VACATION. See *Limitation. Year of Grace.*
VALUATION OF SUITS,
for lands not permanently assessed, an entire mehal, or a portion with defined jumma on it, 84.
of lands permanently assessed, an entire mehal, or a portion with defined jumma, 85.
fractional part of mehal, revenue not being defined as to the part but on the whole, *ib.*
lakhiraj lands, *ib.*

VALUATION OF SUITS,—*(Continued.)*
several distinctly assessed mouzas, 85.
for possession and mesne profits, *ib.*
for any other property, 86.
of a suit on a bond, *ib.*
for possession, on redemption, or on foreclosure, *ib.*
for a temporary or limited possession, 87—89.
for money lent, and to cancel subsequent alienations, 89—91.
effect of under-valuation, 91—93.
pleading as to, *ib.*
VIVUM VADIUM,
when usufructuary mortgage corresponds with, 10, 11.

W.

WASILAT. See *Interest. Mortgagee.*
WASTE,
mortgagee must not commit, 101.
WELCH MORTGAGE,
when identical with an usufructuary mortgage, 10, 11.
WIDOW. See *Hindu Law. Mahomedan Law.*
WUQF. See *Mahomedan Law.*

Y.

YEAR OF GRACE,
mortgagor may redeem at any time within one year from date of actual issue of notice of foreclosure, 189, 191, 2, 201.
is a mere matter of favor and strictly calculated, 192.
if expires on a holiday, a deposit on the first business day is good, 203, 204.
so, if the last day is a Sunday, *ib.*
or falls in the Dusserah vacation, *ib.*
but in such cases a private tender must be made within the strict year, *ib.*

Z.

ZUR-I-PESHGEE LEASE. See *Mortgage. Stamp.*

